TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 373.

EZEKIEL SALOMON AND MYER M. SIMPSON, ASSIGNEES OF JAMES O. NIXON, PLAINTIFFS IN ERROR,

vs.

JAMES GRAHAM, AUDITOR, AND THE STATE OF LOUISIANA, INTERVENOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED NOVEMBER 4, 1871.

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a *Transcript of an appeal from the eighth district court, parish of Orleans. Returnable to the supreme court of the State of Louisiana, on the third Monday of April*, 1871.

STATE OF LOUISIANA, EX REL. SOLOMON AND Simpson,
versus.
JAMES GRAHAM, STATE AUDITOR STATE OF Louisiana.
} No. 448. Mandamus. Devolutive appeal.

Solomon & Simpson, appellants.
James Graham & State of Louisiana, appellees.
Labatt & Aroni, counsel for appellants.
Semmes & Mott, Hays & New, Horner & Benedict, counsel for appellees.

No. 3358. Supreme court of La. Filed April 17th, 1871.
(Signed) M. P. JULIAN,
Dep'y Clk.

1 STATE, EX REL. SOLOMON & SIMPSON,
vs.
JAMES GRAHAM, STATE AUDITOR.
} No. 448.

Petition.—Filed March 3d, 1871.

To the Hon'l H. C. Dibble, the judge of the 8th dist. court for parish of Orleans:

The petition of Ezekiel Solomon and Myer M. Simpson, composing the firm of Solomon & Simpson, both residents of New Orleans and the firm domiciliated in New Orleans, respectfully shews:

That they are the assignees and transferrees of all the right, title, claim, and demands of James O. Nixon, under the act No. 32, entitled "An act for the relief of James O. Nixon, late public printer," passed by the general assembly of the legislature of Louisiana on the 1st of March, 1871, under which act said James O. Nixon was entitled to receive from the State of Louisiana the sum of fifty thousand three hundred and thirty-one $\frac{46}{100}$ dollars, and which said act was to take
2 effect from and after its passage, to wit, 1st March, 1871; and that the auditor of public accounts was, and is, therein required to issue his warrant on the treasurer for said sum, all of which will more fully appear by the notarial transfer, and the certified copy of the act hereto annexed and made part hereof. Your petitioner alleges that, by virtue of said transfer, and as the real and bona-fide owners thereof, they demanded the warrant therefor from said auditor of public accounts, since the passage of said act, and he refused to issue the same and still refuses. Petitioner alleges that this demand is to fulfill a duty attached to his office of auditor by law, and that your petitioners are irreparably injured by said refusal. Petitioners allege that, by law, said duty is ministerial, and your petitioners have legally the right to require him to perform, and that a mandamus is necessary to avoid a denial of justice.

Wherefore petitioners pray for a writ of mandamus to issue,
3 commanding the auditor to issue the warrant required by said act and the laws, and that the same be duly served on James Graham, auditor, to show cause, if any he have, on or before March 8th,

1871, at 10 o'clock a. m., why a peremptory mandamus should not issue, and for costs and for general relief.

(Signed) LABATT & ARONI,
For Petitioner.

Affidavit.

Personally appeared E. Solomon, who, being duly sworn, says he is a member of the firm of Solomon & Simpson, the plaintiffs in the foregoing petition, and that the facts and allegations therein contained are all true and correct.

(Signed) E. SOLOMON.

Sworn to and subscribed before , this the 3d day March, 1871.

(Signed) W. L. EVANS,
Second Justice of the Peace, Parish of Orleans.

Order.

Let a writ of mandamus issue as within prayed for and ac-
4 cording to law, directed to James Graham, state auditor, commanding him to comply with the prayer of the within petition, or show cause to the contrary, on Wednesday, the 8th day of March, at 10 o'clock a. m., 1871.

New Orleans, March 3, 1871.

(Signed) HENRY C. DIBBLE, *Judge.*

An act for the relief of James O. Nixon, late public printer.

Whereas the State of Louisiana, by act of March 22, 1866, and by her contract with James O. Nixon, as public printer, engaged to pay him in cash, monthly, certain rates and prices for public printing by him to be executed; and, whereas said Nixon executed his bond for ten thousand dollars, ($10,000,) to the State, for the faithful performance of his duties as public printer; and whereas the said Nixon did faithfully and promptly execute the duties incumbent on him by law; and whereas the State paid him only part in cash and the remainder in
5 State warrants which he was compelled to receive or get nothing at all; and whereas, to comply with his engagement to the State, he was compelled to sell these warrants at various and heavy discounts; and whereas the good faith of the State requires that it should make good the losses by him thus incurred:

SECTION 1ST. *Be it enacted by the senate and house of representatives of the State of Louisiana in general assembly convened,* That the sum of fifty thousand three hundred and thirty-one dollars and forty-six cents ($50,331.46) be, and the same is hereby, appropriated out of any moneys in the treasury not otherwise appropriated, to be paid to James O. Nixon to reimburse him for the loss and discount suffered by him by reason of the premises stated, and of the failure of the State to pay him in cash, as required by its contracts with him as public printer; and the auditor of public accounts is hereby authorized and required to issue his warrant on the treasurer for the same, and to take
6 the receipt of said James O. Nixon for all further claims against the State.

SEC. II. *Be it further enacted, &c.,* That this act shall take effect from and after its passage.

(Signed) G. W. CARTER,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved.

Governor of the State of Louisiana.

Received in *in* the senate February 28th, 1871.

March 1st, 1871, the senate proceeded, in pursuance to the constitution, to reconsider the bill to be entitled An act for the relief of J. O. Nixon, late State printer, returned to the senate by his excellency the governor with his objections; and it was,

Resolved, That the bill do pass, two thirds of all the members present in the senate having agreed to pass the same.

(Signed) CHA'S H. MERRITT,
Sec. of the Senate.

7 Received in the house, Wednesday, March 1, 1870, and on the same day the house proceeded, in pursuance of the provisions of the constitution of the State, to reconsider the bill to be entitled "An act for the relief of James O. Nixon, late state printer, which was returned to the senate by his excellency the governor with his objections, and sent by the senate to the house with the message relating thereto; and it was,

Resolved, That the bill do pass, two-thirds of the members present in the house having agreed to the same.

(Signed) W'M VIGERS,
Chief Clerk.

A true copy.

(Signed) GEO. E. BOVEE,
Sec. of State.

Ne varietur, for identification with an act of transfer from J. O. Nixon to Solomon & Simpson passed before me this day.

New Orleans, March 3, 1871.

(Signed) P. C. CUVELIER,
Notary Public.

Filed March 3, 1871.

Notarial act of transfer from J. O. Nixon to Solomon & Simpson with return of service on state auditor and state treasurer. March 3, 1871.

8 UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

Before me, P. Charles Cuvellier, notary public in and for this city, and parish of Orleans, duly commissioned and sworn, and, in the presence of the witnesses hereinafter named and undersigned, personally appeared James O. Nixon, of this city, who declared that, for the consideration and price of thirty-five thousand two hundred and thirty-two dollars and two cents, ($35,232.02,) lawful money of the United States, to him in hand cash paid at the execution of these presents, the receipt

whereof is hereby acknowledged and full acquittance granted therefor, he does, by these presents, sell, convey, transfer, assign, and set over unto Messrs. Solomon and Simpson, a firm doing business in this city, composed of Ezekiel Solomon and Meyer M. Simpson, and herein represented by the said E. Solomon, who, for his said firm, accepts the same, all and singular the rights, title, claim, and demand of
9 him, the said James O. Nixon, in and to the sum of fifty thousand three hundred and thirty-one dollars and forty-six cents, ($50,331.46,) due and payable to him, the said Nixon, by the State of Louisiana, under and by virtue of the provisions of an act of the general assembly of this State, entitled "An act for the relief of James O. Nixon, late public printer," being act No. thirty-two, of the session of eighteen hundred and seventy-one, and finally passed in both houses on the first day of March, 1871, notwithstanding the objections of the governor.

The whole, as more fully set forth in the said act, a copy of which, certified by the secretary of state, has, by the transferor, been delivered to the transferees, after being paraphed "ne varietur" by me, the said notary, in order to identify the same herewith:

To have and to hold, and to enjoy and exercise the same rights, title, claim, and demand of the said James O. Nixon in and to the aforesaid sum unto the said Solomon & Simpson, their heirs and assigns, to their own proper use and behoof, in the same manner and to the same
10 extent as he, the said James O. Nixon, could or might do; the said James O. Nixon hereby granting to and conferring upon the said Solomon and Simpson the irrevocable and most ample and exclusive power to collect and receive the aforesaid sum, and to draw, endorse, or accept any warrant, draft, or certificate therefor, and execute and sign the receipt in full required by the said act.

And for the purpose of notifying this transfer, and having the same entered of record to whomever or wherever shall of right appertain, full power and authority are hereby granted to any bearer of a certified copy of this act.

United States internal revenue stamps of the value of fifty cents are hereunto affixed and cancelled.

Thus done and passed in my office, at the said city of New Orleans, in the presence of Martin L. Ainsworth and George Martin, witnesses, of lawful age, and domiciliated in this city, who hereunto sign their names, together with the said appearers, and me, notary, on the third
11 day of March, in the year of our Lord one thousand eight hundred & seventy-one.

(Original signed) J. O. NIXON.
E. SOLOMON.

M. L. AINSWORTH.
GEO. MARTIN.

P. CHA'S CUVELLIER,
Notary Public.

I, the undersigned notary, do hereby certify that on this day I have served two copies of the foregoing act, as follows: On the treasurer of the State, by delivering one of said copies to him in person at his office, and on the auditor of the State, by delivering one of said copies at his office in the hands of Mr. Lawrence, his chief clerk, the said auditor being then out.

New Orleans, March 3, 1871.

(Signed) P. CHA'S CUVELLIER,
Notary Public.

I certify the foregoing to be a true copy of the original, of record in my office. Witness my hand and notarial seal, at New Orleans, this 4th day of March, 1871.

[SEAL.] (Signed) P. CHA'S CUVELLIER,
Notary.

12 *Writ of mandamus.*

Eighth district court for the parish of Orleans.

The State of Louisiana to James Graham, state auditor of public accounts, greeting:

STATE OF L'A, EX REL. SOLOMON & SIMPSON,
vs.
JAMES GRAHAM, AUDITOR, &C. } No. 448.

You are hereby commanded, in the name of the State of Louisiana, and of the eighth district court for the parish of Orleans, to comply with the prayer of the petition, a duly certified copy of which accompanies this writ, or show cause to the contrary on Wednesday, March 8th, 1871, at 10 a. m. And herein fail not under penalty of the law.

Witness the Honorable Henry C. Dibble, judge of our said court, at the city of New Orleans, this third day of March, 1871, and in the ninety-fifth year of the independence of the United States.

(Signed) ROB'T LYNN, *Dept. Clerk.*

Sheriff's return.

Received March 3d, 1871, and on the 4th day of same month and year I served a copy of the within writ of mandamus and accompanying petition on James Graham, auditor, in person.

13 Returned same day.

(Signed) M. FIORATH, *Dept. Sheriff.*

Extract from minutes, March 8th, 1871.

This case, fixed for trial this day, was, on motion of counsel for the relators, ordered to be continued to the 15th day of March proximo, at 10 a. m.

(Signed) J. D. TAYLOR, *Dept. Clerk.*

Answer.

STATE OF L'A, EX REL. SOLOMON & SIMPSON,
vs.
JAMES GRAHAM, AUDITOR OF PUBLIC ACCOUNTS. } No. 448.

To the Honorable Henry C. Dibble, judge of the eighth district court for the parish of Orleans:

Now into comes James Graham, auditor of public accounts of the State of Louisiana, upon whom a petition and rule nisi for a peremptory writ of mandamus has been served, commanding him to show cause why he should not issue a warrant for the sum of fifty-one thousand three hundred and thirty-one and $\frac{46}{100}$ dollars, ($51,331.46,) in favor of

relators as transferees of James O. Nixon, under and by virtue of
14 an act of the legislature of Louisiana, entitled "An act for the relief of James O. Nixon, late public printer," passed by the general assembly on the first day of March, 1871, and for answer to said petition and rule nisi for a mandamus for cause shows—

That, as a constitutional officer of the State of Louisiana, he has sworn to support the constitution of said State;

That his interest herein arises from his desire to hold inviolate his oath of office and protect himself on his official bond, given for the faithful performance of the duties thereof, as prescribed by law;

That, in and by the third amendment to the constitution, promulgated on the fifteenth day of December, 1870, it is set forth as follows, viz:

ARTICLE. "That, prior to the first day of January, 1890, the debt of the State shall not be so increased as to exceed twenty-five millions of dollars."

Now respondent avers—

That the claim, on which the prayer of relators is based, was no part of the debt of the State of Louisiana on the fifteenth day of December, 1870, or the first of March, 1871, or the present time, and said claim formed no part of the expenditures for the necessary government,
15 maint*ai*nance of peace, order, and prosperity, or the administration of the laws of said State, and that the general assembly thereof was without power to pass the aforesaid act, and the same is in violation of the article of said constitution above set forth, and is null and void for the following, among other causes, to be set forth on the trial hereof:

That, prior to the passage of said act, and since, the debt of the State of Louisiana has exceeded the sum of twenty-five millions of dollars.

That the annual revenues of said State of Louisiana are not, and have not been since the year 1865, sufficient to meet the necessary annual expenditures and ordinary current expenses of said State, and, under the present rate of taxation, will not hereafter be sufficient for such purpose.

That, neither on the first of March, 1871, or since, has there been any money in the State treasury against which to warrant for said claim, if valid, which is denied, or wherewith said claim can be paid; that, on the contrary, there were, on the first March, 1871, and yet unpaid, outstanding warrants on the treasury amounting to the sum of
16 $\$2{,}146{,}141\frac{58}{100}$ dollars, and there was and is no money wherewith to pay the same.

That the forms of law and requir'ments of the constitution were not observed on the passage of said bill by the general assembly.

That the said James O. Nixon has been paid in full by the State of L'a as public printer under and in pursuance of act 33 of the extra session of 1870, entitled "An act for the relief of James O. Nixon," approved March 16, 1870.

That the general assembly is without delegated or other power, and has no authority, to make donations to individuals for private purposes.

That a warrant of the auditor upon the treasurer is equivalent to the issue of a bond or any other obligation or debt of the State for the payment of money not in the treasury.

That the constitution of State is paramount to the acts of the general assembly thereof, and any act done in violation thereof is null and void, and cannot be enforced in any of the courts of this State.

Wherefore your respondent prays that the petition of relator be

17 dismissed, and his application for a writ of mandamus be denied, with costs, and for all general relief.

(Signed) SEMMES & MOTT,
" HAYS & NEW,
" HORNOR & BENEDICT,
Of Counsel.

James Graham, being sworn, says that all the facts and allegations set forth in the foregoing answer, as within his own knowledge, are true and correct, and those derived from information of others he believes to be true.

(Signed) JA'S GRAHAM.

Sworn to & subscribed before me this the 15th day of March, 1871.

(Signed) J. D. TAYLOR,
Dep't. Clerk.

Filed March 15th, 1871.

Petition of intervention by State of Louisiana.—Filed March 15th, 1871.

To the honorable the judge of the eighth dist. court in and for the parish of Orleans, State of Louisiana:

The petition of intervention of the State of Louisiana, officially represented by Simeon Belden, attorney general of said State, which she prays to be allowed to file in the suit by mandamus in this honorable court entitled Ezekiel Solomon and Meyer M. Simpson, composing the firm of Solomon and Simpson, vs. James Graham, auditor
18 of public accounts of the State of Louisiana, and numbered on the docket thereof No. 448, respectfully represents that the mandamus prayed for in said suit should be refused, and demand rejected, for the reasons that the act of the general assembly of the State of Louisiana entitled "An act for the relief of James O. Nixon, late public printer," being act No. 32 of the acts of the general assembly of Louisiana, 1871, and under which act the said Solomon & Simpson base their right to mandamus and payment, is in violation of *of* the constitution of the State of Louisiana, and is null and void and of no effect in law, for this, that said act of the legislature of Louisiana, if allowed to be executed, would increase the debt of the State of Louisiana beyond twenty-five millions of dollars, in contravention and violation of the amended article of the constitution of this State, which reads: "Prior to the first day of January, one thousand eight hundred and ninety, the debt of the State shall not be so increased as to exceed twenty-five millions
19 of dollars." Petitioner and intervenor respectfully represents that this intervention on the part of the State of Louisiana is based upon the official information of the auditor of public accounts of this State, James Graham, defendant in this suit.

That, as the financial officer and agent of the State, in whose custody and keeping is lodged the evidences of the debt of the State, he has refused to warrant in favor of pl'ffs in this suit for the reason set forth in this intervention.

Wherefore petitioner prays that she be allowed to intervene herein; that this petition of intervention be served on said Solomon & Simpson, relators herein, and, after due and legal proceedings had, that this petition of intervention be maintained, and that said act of the legislature of Louisiana "for the relief of James O. Nixon, late public printer," be declared violative of the amended article of the constitution of the

State of Louisiana, as increasing the debt of the State in excess of twenty-five millions of dollars, and for that reason the same be decreed null and void; and further, for the reason stated in this petition of intervention, that the mandamus prayed for against said auditor of
20 public accounts, James Graham, be refused at relator's cost, and for general relief.

(Signed) SIMEON BELDEN,
Attorney General.

(Signed) JOHN H. NEW,
Of Counsel.

Order.

Let this petition of intervention of the State of Louisiana be filed, and parties cited, as prayed for.

New Orleans, March 15, 1871.

(Signed) HENRY C. DIBBLE, *Judge.*

Service accepted.

(Signed) LABATT & ARONI,
For Relators.

Exceptions to intervention.—Filed March 15, 1871.

STATE OF L'A, EX REL. SOLOMON & SIMPSON,
vs.
JAMES GRAHAM, AUDITOR. } No. 448.

Eighth district court.

And now comes relator, and, for exception to the intervention of the State of Louisiana herein filed by the attorney general, pleads—

1st. That this is not such a case as authorizes the intervention of the State to prevent the issuance of the warrant demanded under the act 32, legislature of 1871.

21 2nd. That the State is estopped by the terms of the act itself from appearing herein for the purposes set forth in the intervention, and in law *an* estopped from disputing the validity of its acts duly passed according to law, and binding upon all officers of the government.

3d. That the intervention discloses no cause of action, aud should be dismissed upon the foregoing grounds.

Note by clerk on the exceptions.

The foregoing exceptions, upon presentation, w*as* ordered to be overruled.

Extract from minutes of March 15th, 1871.

STATE OF L'A, EX REL. SOLOMON & SIMPSON,
vs.
JAMES GRAHAM, STATE AUDITOR. } No. 448.

This matter, fixed for trial this day, came on.

Present, Labatt & Aroni for relators; Semmes & Mott, Hornor & Benedict, Hays & New, for respondent.

Relators having submitted to the court an exception to the intervention of the State, it was ordered by the court that it be overruled, when the trial of the matter was proceeded with.

22 *Testimony taken and filed M'ch* 15, 1871.

Relators offer in evidence a certified copy of act No. 32 of the acts of the legislature of 1871, filed and marked "A B."

NOTE.—(See page 8.)

Also copy of the issue of the New Orleans Republican, the official journal of the State, of the date March 4th, 1871, to show the publication of this act, (page 61.)

Also the notarial transfer from James O. Nixon to Solomon and Simpson, filed and marked "B," (page 13.)

E. SOLOMON, sworn for relators, says:

Q. You are a member of the firm of Solomon & Simpsom?

A. Yes.

Q. You are the relator in this case?

A. Yes.

Q. Did you, with a copy of act No. 32, and the notarial transfer in evidence, call upon the auditor?

A. Yes.

Q. And demanded a warrant for the amount specified in that act?

A. Yes.

Q. Did the auditor refuse to issue it?

A. Yes; he declined to issue it on the grounds that he said he
23 wished to test in court.

Q. He refused to issue a warrant for the amount?

A. Yes.

Q. Did you call once, or more than once?

A. The first time I called the auditor was not there; the second time I had an interview with him, when he refused to issue the warrant.

Q. Did you exhibit the act itself, and the transfer?

A. I gave him all the papers and he said they were all correct.

Relators close their testimony-in-chief.

JAMES GRAHAM, respondent, sworn:

Q. What is your official position?

A. Auditor of public accounts of the State of Louisiana.

Q. You have taken the oath required by the constitution, and given bonds?

A. Yes.

Q. Do the books of your office show the indebtedness of the State of Louisiana?

A. They do.

Q. Have you examined the books of your office to ascertain that indebtedness?

A. I have.

Q. Will you examine this statement (marked C, page) and state how was that prepared?

24 [NOTE.—Counsel for relators object to the introduction of this document. Objection overruled. Counsel for relators reserve the point in so far as witness is testifying for respondent; but so far as he is a witness for the State no objection is made.]

Answer. This statement is made from the accounts and the report of

the auditors, and from the acts of the legislature adding to the obligations of the State.

Q. Can you from that statement inform the court of the total amount of the bonded debt, outstanding, of the State of Louisiana?

A. Yes, sir.

Q. What is the amount?

A. The total amount of the bonded debt of the State is $22,560,233.00 *dollars*.

Q. Can you inform us of the amount of outstanding warrants issued by the State of Louisiana and unpaid up to the 1st of March, 1871?

A. The whole amount of the obligations is $2,146,141.58.

(Respondent offers in evidence statement marked "C," now filed.)

Q. Will you state the number of bonds outstanding of the State
25 of Louisiana on the 30th of November, 1870?

A. They have not been increased since that time. ($22,560,233.)

Q. What has been the increase of warrants and certificates since that time?

A. The increase since the first of January 1871, up to the 1st of March, 1871, is $5,552,174.14 *dollars*.

Q. What was the total existing debt of the State of Louisiana on the 31st of December, 1870.

A. I estimated the total existing debt was $25,021,734.40.

Q. That was on the 31st of December, 1870?

A. Yes.

Q. Has it been increased by the issue of warrants since, that are outstanding unpaid.

A. Yes.

Q. By what amount?

A. By the amount of ($552,174.14) five hundred and fifty-two thousand one hundred and seventy-four $\frac{14}{100}$ dollars, to the first of March, for the month' of January and February.

Q. State whether there was any decrease of the debt, either in bonds or warrants, between the 30th of November, 1870, and the 15th of December 1870?

26 A. I cannot at this moment say, there could not have been to any material amount, however.

Q. Has there or not been an increase of the debt of the State since your last annual report?

A. There has been an increase of the debt as evidenced by warrants and certificates of indebtedness.

Q. It appears from your statement that there is therein placed, as accrueing debt, some $15,000,000. Have any of those bonds been issued?

A. Not to my knowledge. No.

Q. Why was that amount placed upon your books as accrueing debt of the State?

A. Because I regard those debts in almost an equal degree as obligations of the State, as those already funded.

Q. How do they accrue?

A. They accrue from various acts of the legislature, granting aid—chiefly to railroads, as specified in the statement itself.

Q. These accrueing debts are not included in the $5,200,000 bonds.

A. No, sir.

Q. There appears from your statement of accrueing debts a certain balance of bonds to be issued to railroad companies; were there certain bonds issued to railroad companies?

27 A. There were. To the Northern Louisiana and Texas Railroad

a considerable portion of those authorized by law have already been issued.

Q. They are comprised within your statement of bonds outstanding?

A. Yes.

Q. The balance due those companies under the acts of legislature, are set forth as accrueing debts?

A. Yes.

Q. In your statement we find bonds of the State to be issued to railroads (Chattanooga) three million?

A. Yes.

Q. They have not yet been issued?

A. Not to my knowledge.

Q. Under what head in your last annual report to the legislature does the number of bonds issued by the State appear?

A. I think statement E.

[NOTE. Defendant offers in evidence the annual report of the auditor for 1870, and specially statement "E" of said report, pages 40 to 45, inclusive.]

Q. Will you look at act No. 33 of the acts of the extra session of 1870, entitled "An act for the relief of J. O. Nixon," and state whether any action was had under that act?

28 A. I drew the warrant therein specified to J. O. Nixon, in person, I think.

[NOTE.—Defendant offers in evidence this act No. 33 of the extra session of the legislature of 1870.]

Q. You have certified statement "C" to be true, in your official capacity as auditor?

A. Yes, sir.

Q. Do you know whether there is any money in the Treasury to the credit of the general fund, to pay warrants issued within the last year or two, to pay current expenses? Are such warrants now payable on demand?

A. No, sir.

Q. Have there been within the last six months?

A. No, sir.

Q. When Solomon & Simpson made their claim, was there any money in the treasury to pay it? Were the books examined by the treasurer in your presence?

A. Yes.

Q. And his reply was——

A. That there was only a very inconsiderable sum in the treasury—one or two thousand dollars.

Q. When application was made to you for warrants or *a* warrant, did they ask you for one warrant, or to have it split up into smaller ones?

A. I do not remember; I do not think matters had advanced

29 so far. My impression is, that I refused at once.

Q. Was any receipt tendered to you by Nixon at the time demand was made for this appropriation?

A. No; there was no receipt handed to me.

Q. Will you look at that statement, and state whether it is correct?

A. That is a statement made from the books of my office, and it is correct.

[NOTE.—Defendant offers in evidence this document marked "D," being a statement of the actual expense for the past years, and the probable expenses for 1871 of the State of Louisiana. See page .]

Cross-examined:

Q. The first item of your statement, bonded debt—$22,560,233.00—does that comprise the bonds which were endorsed by the State in favor of the banks? I see in your report you speak of a liability of four millions for the property banks?

A. There are no such bonds endorsed by the State; they are bonds issued by the State to the banks.

Q. They are contained in this item of $22,560,233?

A. Yes.

Q. These exact amount of these bonds issued to the property banks is $4,838,000, as per page of the auditor's report?

A. Yes.

Q. This liability appears on your books as a separate obligation of the State. I see you do not put these bonds in with the others?

30 A. The reason they are not put with the others is, that that course was adopted by my predecessor in office.

Q. Are those bonds issued to the property banks mixed up with the other bonds?

A. They appear on the bond-boock as obligations of the State—bonds issued by the State, signed by the governor, treasurer, and auditor, and made payable to the president and directors of the bank.

By the COURT. Under what act of the legislature were those bonds issued to the banks?

A. By act of 30 January, 1836, and also act of 19 February, 1828.

Q. By COUNSEL. Those bonds have been regularly issued by the State?

A. Yes.

Q. And are now outstanding?

A. Yes.

Q. Where are they?

A. A large portion are in the possession of the Citizens' Bank, and a small portion in the possession of the Consolidated Bank or their creditors.

Q. They were divided between these banks?

A. They were issued for the benefit of these banks, and made payable to the officers of these banks.

Q. The State did not endorse them?

A. No.

Q. Does it appear on the books of your office that the State has

31 been called upon to pay those bonds, or any interest on those bonds issued to the banks?

A. I have no knowledge of it.

Q. Neither principal nor accruing interest?

A. I have no knowledge of it.

Q. If demand had been made for the payment of these bonds, or interest, would not it have come to your knowledge?

A. Not necessarily; but the presumption is that these two banks have fulfilled their obligations to the State.

Q. How far back have you examined the books of the auditor's office—how many years—two, three, or five years?

A. Very probably I have.

Q. During that time you have never found that the State has been called upon to pay any of these bonds?

A. No; the question was never presented before.

Q. In your evidence you have said that there were outstanding warrants of the State to the amount of $2,146,141.58 *dollars*. Have any of

those warrants, since the 1st of March last, been taken up and exchanged for bonds? Are they all outstanding, or have any been paid in since?

A. So far as my official knowledge extends, they have not been exchanged. I have no official information that any exchange has been effected that would affect the amounts as outstanding.

Q. Do you know officially the amounts outstanding?

32 A. The only means I have of information is a periodical examination of the books of the treasurer, and by comparing them with my own. That is my guide as to what is outstanding.

Q. You are a member of the board of liquidators?

A. Yes.

Q. Is it not within your knowledge, as such, that warrants have been exchanged for bonds?

A. No.

Q. Or that there are bonds in existence to be exchanged for warrants?

A. Yes.

Q. Will the amount of outstanding obligations of the State be reduced by this exchange?

A. It is very probable that when that transaction is consummated, it will reduce the amount of outstanding obligations.

Q. Under the law it is made the duty of the liquidators to allow those bonds to be given in exchange for warrants?

A. Yes.

Q. Therefore there are two evidences of one debt. Is there not a part of those bonds now in existence set apart for the exchange of warrants?

A. It is probable that they are, and when the exchange is consum'ated, it is probable that there will be a reduction of one-half the amount of the outstanding warrants.

[NOTE.—It is admitted that the amount of bonds in the hands of the board of liquidators, to be exchanged for warrants at the rate of
33 seventy cents on the dollar, is $513,000.00, which will retire $359,100 of warrants.]

Q. You have made a calculation of the probable indebtedness, in your evidence, under the acts of the legislature?

A. Yes.

Q. You mean eventual obligations?

A. Obligations under various acts of the legislature.

Q. How do you know the existence of those acts?

A. By reference to the acts published.

Q. How do you know the existence of the acts of the last session?

A. I have not taken into consideration the bills passed by the last session, except in isolated cases.

Q. Those $126,000 ($126,000) in bonds, as per your report, remain to be issued to the Mississippi and Mexican Gulf Canal Co.?

A. Yes.

Q. None of the accrueing debt is evidenced by existing bonds?

A. No; what I call actual debt is represented by actual bonds, warrants, and certificates.

Q. When you make your estimates of the requirements of the State to pay her liabilities, do you ever take into consideration the amount of the bonds issued to the property banks?

A. No; I am not perfectly certain upon that calculation.

Q. Your official report shows that you never put in any estimate of so and so much money needed to pay the interest on these bonds?

34 A. My impression is that it is not among the items that the law requires me to compute.

Q. When you make your estimate of the requirements of the State to carry on the government, what composes "contingent expenses" of the State?

A. General expenses not absolute and indispensible. An illustration of the mode is to be found in the last annual report itself, where an estimate is made of the expenses of the current year.

Q. Are the warrants reported outstanding warrants issued under appropriations of the year 1870?

A. The report itself will show the statement includes warrants for all previous years, running back three, four, and five years.

Q. What warrants compose the "outstanding warrants"—of what year?

A. I suppose there are warrants from 1866, 1867, 1868, 1869, and 1870. There are no doubt warrants outstanding for all those years. The report itself is the best evidence. In my annual estimate of expenses I do not include warrants.

Q. Has there been a demand upon you by any of the parties whom you have mentioned under the column of accrueing debt for the issuance of bonds?

A. There could not have been, because I am the last person to issue the bonds. They come to my hands from the governor and the treasurer. The law in each case defines the time when the bonds become demandable.

35 [NOTE.—Statements G & H of the auditor's report for 1870, pages 47, 48, 49, and 50, are filed in evidence by consent of all parties.]

JOHN G. GAINES sworn for relators.

Q. You are president of the Citizens' Bank?

A. Yes.

Q. The State has issued bonds for the benefit of the Citizen's Bank?

A. Yes.

Q. Do you know the amount?

A. $3,600,000 as near as I can state from memory.

Q. The auditor's report says $4,297,000.

A. Without going to the bank I cannot give you any report of it.

Q. Has the State ever been asked to pay any part of these bonds or interest on them?

A. I believe in 1837, but not since 1853.

Q. I' the bank providing means, and is it in a condition to meet the liabilities accrueing on these bonds?

A. I have no doubt of it; there are $14,000,000 of mortgages upon which the debt rests.

Q. Under the charter of the bank, I believe, you collect part of that indebtedness every year?

A. Yes.

Q. Do you use that to pay the interest on these bonds?

A. Yes, as far as collected.

Q. Is it within your knowledge of the condition of the bank that the State will be called on to pay any of these bonds?

36 A. I cannot look sixteen years ahead by knowledge, but I have no doubt the bank will meet its obligations.

Q. Did the bank meet its obligations during the war and during the overflow?

A. Yes; and part of its debt was extinguished during that time.
Q. And since then?
A. The obligations have been met regularly.

Cross-examined:

Q. Was not the bank prior to 1853 suspended, and application made to the legislature to re-organize it?
A. Yes.
Q. And in 1853 a cash capital was advanced to put the bank in operation?
A. Yes; $1,000,000.
Q. Has not the legislature in 1857 extended the time for the payment of obligations of the bank?
A. It authorized the bank to extend them with the will of the holders.

ANTOINE DUBUCLET sworn for defendant.

Q. What is your position?
A. State treasurer of the State of Louisiana.
Q. Can you state the amount of money to the credit of the general fund in the treasury during the past four days in March, 1871?
A. No, sir.
Q. Can you state about the amount on the 2d of March?
A. There was no money then in the general fund.
Q. And on the third of March last?
37 A. Also the same—none.
Q. And on the fourth of March?
A. Also, none.
Q. Is there any money in the general fund now?
A. No, sir.
Q. How long have you been treasurer?
A. Two years and a half.
Q. Has there been any moment of time since you have been treasurer that there has been any money in the treasury to the credit of the general fund—sufficient to pay all warrants, so that anybody who went there with a warrant against the general fund could receive payment?
A. No, sir.
Q. In other words, the warrants against the general fund outstanding were always in excess of the amount of the general fund?
A. Yes; a great deal.
Q. Have you, since the first of December, 1870, received any money in the treasury?
A. Of course.
Q. Can you tell how much?
A. No, sir; you can refer to my monthly reports and get the exact amount, or else to the books of the office. My statements are *are* published in the N. O. Republican.
Q. Will you furnish a statement of the money received in the treasury since the first of December?
A. Yes; you can get it to-morrow.
38 Q. Have you paid any warrants since the first of December?
A. Yes.
Q. Will you furnish a statement of the warrants paid since the first of December, 1870?
A. Yes; you can get it by to-morrow at 12 o'clock.
[NOTE.—Relators offers in evidence the official debates, as published in the N. O. Republican, which took place at the time of the passage of

the act No. 32, of 1871, over the governor's veto. Objected to as irrelevant. Objection sustained; and counsel for relators reserved the point for a bill of exceptions.]

Continuation of extract from minutes of 15*th March*, 1871, (*from page* 33.)

* * * * * * *

After hearing pleadings, evidence, and counsel, it is ordered by the court that this case be continued to Tuesday March 21st, 1871, at 10 o'clock a. m.

Official publication of act No. 32, *in the N. O. Republican, of date March* 4*th*, 1871, *and filed March* 15*th*, 1871.

[No. 32.]

"An act for the relief of James O. Nixon, late public printer."

Whereas the State of Louisiana, by act of March 22, 1866, and by her contract with James O. Nixon, as public printer, engaged to pay
39 him in cash, monthly, certain rates and prices for public printing by him to be executed; and whereas said Nixon executed his bonds for ten thousand ($10,000) dollars to the State for the faithful performance of his duties as public printer: and whereas the said Nixon did faithfully and promptly execute the duties incumbent on him by law; and whereas the State paid him only part in cash, and the remainder in State warrants, which he was compelled to receive, or get nothing at all; and whereas to comply with his engagements to the State he was compelled to sell these warrants at various and heavy discounts; and whereas the good faith of the State requires that it should make good the losses by him incurred:

SECTION 1. *Be it enacted by the senate and house of representatives of the State of Louisiana in general assembly convened*, That the sum of $50,331.46, (fifty thousand three hundred & thirty-one $\frac{46}{100}$ dollars,) be, and the same is hereby, appropriated out of any moneys in the treasury not otherwise appropriated, to be paid to James O. Nixon to reimburse him for the loss and discount suffered by him by reason of *of* the premises stated, and of the failure of the State to pay him in cash as required by its contract with him as public printer; and the auditor of public accounts is hereby authorized and required to issue his warrant on the State treasurer for the same, and to take the receipt of the
40 said James O. Nixon for all further claims against the State.

Be it further enacted, That this act shall take effect from and after its passage.

(Signed) GEO. W. CARTER,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieut. Gov. & Pres't of Senate.

Received in the senate, February 28, 1871.

March 1st, 1871, the senate proceeded, in pursuance of the constitution, to reconsider the bill to be entitled An act for the relief of James O. Nixon, late State printer, returned to the senate by his excellency, the governor, with his objections, and it was—

Resolved, That the bill do pass, two-thirds of all the members present in the senate having agreed to pass the same.

(Signed) CHARLES H. MERRITT,
Secretary of the Senate.

Received in the house on Wednesday, March 1, 1871, and on the same day the house proceeded, in pursuance of the constitution of the State, to reconsider the bill to be entitled An act for the relief of James O. Nixon, late State printer, which was returned to the senate, by his excellency, the governor, with his objections, and sent by the senate to the house, with the message relating thereto, and it was—

41 *Resolved*, That the bill do pass, two-thirds of the members present in the house having agreed to pass the same.

(Signed) WILLIAM VIGERS,
Chief Clerk of the House of Representatives.

A true copy.
(Signed) GEO. E. BOVEE,
Sec. of State.

Document "C."—Filed in evidence, March 15th, 1871.

State debt, computed up to 31st day of December, 1871:

EXISTING DEBT.

Total amount of State bonds, as per annual report of 1870		22,560,233 00
Outstanding auditor's warrants issued between the 1st of April and the 31st of December, 1870	$1,300,311 81	
Outstanding certificates of indebtedness, issued between the 1st of April and 31st December, 1870	293,655 63	
Over	1,593,967 44	22,560,233 00
42 Over	$1,593,967 44	$22,560,233 00
Outstanding certificates of indebtedness, issued under act 5, of 1866	33,630 00	
Balance due on vacant estates	$13,529 58	
Due purchasers of lands for redemption of same	$15,159 77	
Due on proceeds of slaves, sold out of depot	$3,781 60	
Due the General Government under deposit act	$479,919 14	
Amount due the free school accumulant fund, the same having been borrowed from said fund, under act No. 45 of 1863	$200,000 00	
Amount due the public land fund, under act No. 49, of 1863	$117,275 77	
Deposited by syndics of creditors of William Kumer & Co.	2,791 29	
		2,460,054 59
		$25,020,287 59

43		$25,020,287 59
	Deposited by creditors of Morgan, Dorsey & Co.	1,446 81
	Total	$25,021,734 40

ACCRUING DEBT.

	Remaining bonds of the State to be issued in favor of the Mississippi and Mexican Gulf Ship Canal Company, $474,000 having been issued, act No. 116, of 1869 ($126,000 00)	126,000 00
	Remaining bonds of the *the* State, to be issued to the North Louisiana and Texas R. Road, the entire length of said road being about 190 miles, at $6,000 per mile, and 91 miles thereof having been already paid for and included in the bonded debt (act 108 of 1868)	594,000 00
	Bonds of the N. O. and Mobile and Chattanooga R. R. Co., the payment of which, the State guarantees under the first section of act No. 26, of 1869, the	$25,741,734 40
44	entire length of the road being 226 miles, at $12,500 per mile	$25,741,734 40 $2,825,000 00
	Also, under act No. 31, of 1870, 5th clause of the 4th section thereof, the entire length of the road being about 200 miles, at 12,500 per mile	$2,500,000 00
	Bonds of the State, to be issued to the said railroad, in accordance with the provisions of the 7th section of act No. 31, 1870	$3,000,000 00
	Bonds of the New Orleans, Baton Rouge & Vicksburg R. R. Co., guaranteed by the State to an amount not exceeding $12,500 per mile of said road and its branches, as per act No. 143, of 1869, (estimated number of miles, 500)	$6,250,000 00
		$40,316,734 40
	Obligation to subscribe for 1,000 shares of the stock of the Mississippi Valley Navigation Co. of	$40,316,734 40
45	South and West, as per act No. 84, of 1870	100,000 00
	Total	$40,416,734 40

RECAPITULATION.

State bonds	$22,560,233 00
Auditor's warrants and certificates	1,593,967 44
Miscellaneous debts	867,533 96
Total	$40,416,734 40
Amount brought forward	$40,416,734 40
Amount of outstanding warrants issued during the months of January & February, 1871	$458,730 57
Amounts of certificates of indebtedness issued during the months of January & February, 1871	$93,443 57
Total am't State debt	$40,968,908 54

46 STATE OF LOUISIANA, AUDITOR'S OFFICE,
New Orleans, March 15, 1857.

I hereby certify the above and foregoing to be a true and correct statement of the debt of the State on the 1st day of March, 1871.

[SEAL.] (Signed) JA'S GRAHAM, *Auditor.*

Document "D."—Filed in evidence March 15th, 1871.

Receipts into the State treasury since and including the year—

1865	$656 743 95
1866	3, 692, 731 76
1867	1, 920, 344 79
1868	3, 922, 647 00
1869	4, 937, 759 07
1870	6, 537, 959 37
Total	$21, 668, 185 94

Expenditures since and including the year 1865—

1865	$871, 967 76
1866	2, 451, 943 77
1867	3, 513, 950 71
1868	4, 476, 990 38
1869	4, 217, 595 98
1870	7, 050, 636 59
Total	$22, 583, 085 19

47 *Rate of taxation.*

1865.

3¾ mills on the dollar, or 37½ cents on the $100.00, divided as follows:
State tax—2½ mills on the dollar, or 25 cents on the $100.00.
Mill tax—1 mill on the dollar, or 10 cents on the $100.00.
Interest tax—¼ mill on the dollar, or 2½ cents on the $100.00.

1866.

Rate of taxation same as previous year.

1867.

5¼ mills on the dollar, or 52½ cents on the $100. 00, divided as follows:
State tax—2½ mills on the dollar, or 25 cents on the $100.00.
Mill tax—1 mill on the dollar, or 10 cents on the $100.00.
Interest tax—¾ mill on the dollar, or 7½ cents on the $100.00.
Levee tax—1 mill on the dollar, or 10 cents on $100.00.

1868.

Rate of taxation same as that of 1867.

48 1869.

7½ mills on the dollar, or 75 cents on the $100.00, divided as follows:

State tax—2½ mills on the dollar, or 25 cents on the $100.00.
Mill tax—2 mills on the dollar, or 20 cents on the $100.00.
Interest tax—2 mills on the dollar, or 20 cents on the $100.00
Levee tax—1 mill on the dollar, or 10 cents on the $100.00.

1870.

14½ mills on the dollar, or $1.45 on the $100, divided as follows:
State tax—4 mills on the dollar, or 40 cents on the $100.00.
Mill tax—2 mills on the dollar, or 20 cents on the $100.00
Interest tax—4½ mills on the dollar, or 45 cents on the $100.00.
Levee tax—1½ mills on the dollar, or 15 cents on the $100.00.
Special levee tax—2½ mills on the dollar, or 25 cents on the $100.00.

Probable receipts during the year 1871.

From taxes of 1870	$3,700,000 00
" back taxes	800,000 00
Licenses of 1871	600,000 00
Other sources	200,000 00
Total	$5,300,000 00

49 *Treasurer's report.—Filed March* 16, 1871.—*Statement of receipts and expenditures of the State treasury from* 1*st December*, 1870, *to the* 28*th of February*, 1871.

Balance Nov. 30, 1870	$2,071 19
Total receipts	432,415 43
Less deductions to	434,486 62
Tax collectors	$171,029 42
Actual receipts & balance	$263,457 20
Am't warrants paid during same period	$258,411 50
	5,045 70
Less State notes	1,390 00
Bal. in U. S. currency	$3,655 70

All other funds.

Balance Nov. 30, 1870	365,067 57
Total receipts	1,505,195 25
	$1,870,262 82
Less deductions to tax collectors	$316,163 62
Actual receipts including balance	$1,554,099 20
Amount of warrants paid since	$1,221,849 13
	$332,250 07
Less State notes on hand	$14,805 00
Balance on hand in U. S. currency	$317,445 07

(Signed) ANT. DUBUCLET,
State Treasurer.

50 *Bill of exceptions.—Filed March* 15, 1871.

STATE OF LA., EX REL. SOLOMON & SIMPSON,
vs.
JAMES GRAHAM, AUDITOR. } No. 448.

Be it remembered that, on the trial of the rule to show cause herein, this 15th day of March, 1871, the defendant in rule being on the stand as a witness, was proceeding to give verbal testimony to show or tending to show that the constitutional limitation of twenty-five millions indebtedness by the State had been reached, and that by reason thereof the act No. 32 was null and void, and of no effect, and did not impose upon defendant the duty to issue a warrant as therein provided, and could by him be refused, when the r'ator, by his counsel, objected and excepted on the following grounds:

1st. That it was an issue irrelevant to the pleadings, and not directly connected with the only issue presented by the mandamus and the rule, and is irresponsive thereto.

2d. That the only question raised by relator was duty now, under the act of the legislature No. 32.

3d. That it is incompetend and inadmissable to hear oral evidence offered to limit or paralize the powers of the general assemby in the construction of constitutional provisions, purely directory in their nature, without first showing that legislative action had been had to estab-

51 lish the mode and manner of carrying into effect the constitutional provisions, and resting in the witness' authority to determine the question when the limitation was reached. That the prohibition of the constitution did not intend, and does not, invalidate the contract or nullify the law imposing the duty on the auditor.

That an act of the legislature is required to carry *it* into effect and execution, the provisions of the constitution.

That it points to something more to be done and looks to the future, not only for its fulfillment, but for the means by which it was to be accomplished. Legislative provision is indispensible to carry into effect the object of this prohibition. That it requires the sanction of penalties to effect this object.

That there must necessarily be penalties for a violation of the prohibition or it remains in law inop'rative, and merely declaratory. That it is unreasonable to suppose that if this prohibition were intended per se to operate without any legislative aid, that there would not have been some guards and checks thrown around to ensure its execution, and some provisions by which the legislature should be officially informed as to the fact, and what was to constitute the debt of the State, and its mode of accertainment.

That the prohibition was not in force by virtue of the constitu-

52 tional provisions. That it is & was directory to the legislature and had no force till the legislature enacted laws to carry out the constitution.

4th. Because the auditor cannot testify orally to contradict or vary his written official report furnished to the general assembly in accordance with law, and as said official report shows an indebtedness of less than twenty-five millions, the auditor cannot be permitted to testify that the indebtedness exceeds that sum. All of which objections were overruled because the auditor was testifying not only on behalf of himself, but also on behalf of the State which has been permitted to inter-

fere. To which ruling of the court relators excepted, and now tender this bill of exceptions to be signed by the court.

(Signed) HENRY C. DIBBLE, *Judge.*

Extract from minutes of March 21, 1871.

STATE OF LA., EX REL. SOLOMON & SIMPSON, *vs.* JAMES GRAHAM, STATE AUDITOR. } No. 448.

This matter continued to this day for argument, came on—

Present, Labatt & Aroni for relators; Hays & New & Hornor & Benedict for respondent—

When, after hearing further arguments of counsel, *to* court took the matter under advisement.

53 *Public debt statement.—Introduced and filed March 21st,* 1871, *in connection with testimony taken March 15th,* 1871.

Am't of bonds admitted as debt	$17,721,300 00
Consolidated bank bonds, sec. 4, act of Feb'y 19, 1828.	$541,600 00
Citizens' bank bonds, sec. 2, act Jan'y 30, '36	$4,297,333 33
Outstanding warrants and certificates to 1st March, 1871	$2,146,141 58
State notes, act 5 of 1866	$33,445 00
Due vacant estates, C. C. art. 1192	$13,529 58
Due redemption of lands, act 224 of 1847, sec. 60 & 62.	$15,159 77
Due owners for sale absconded slaves	$3,781 60
Due U. S. Gov't deposit fund, 5th Stats., 55, sec. 13.	$479,919 14
Due free school fund borrowed by act 45 of 1863, & act 182 of 1857	$200,000 00
	$25,441,220 00

54

	$25,441,220 00
Due public land fund, (borrowed by act 45 of 1863, & act 182 of 1857)	$117,275 77
Due insolvent estates, C. C	$4,238 10
	$25,562,733 87
Deduct warrants outstanding, for which bonds are in the hands of the city bank et als	$359,000 00
Total outstanding debit	$25,203,733 87

Reasons for judgment.

STATE OF LA., EX REL. SOLOMON & SIMPSON, *vs.* JAMES GRAHAM, STATE AUDITOR. } No. 448.

This is an application for the writ of mandamus to compel the state auditor to issue a warrant upon the State treasury for the sum of $50,331.46.

The claim arises out of an act of the legislature No. 32, bearing date

March 1st, 1871, entitled "An act for the relief of James O. Nixon, late public printer."

The bill appropriates the aforesaid amount and directs the auditor to warrant for the same.

The relators allege that they are the assignees and transferrees of Nixon; that they have demanded the warrant, but that the auditor refuses to issue the same, wherefore these proceedings.

The auditor, in his return, urges two reasons in justification of his refusal to issue the warrants.

55 First. That the law aforesaid violates the third amendment to the constitution of the State, in this, that it increases the debt of the State, which is already in excess of the limit of twenty-five millions imposed by said amendment.

Second. That the legislature has no constitutional authority to make a gift; that the act under which relators claim, simply donates the aforesaid amount of money for private purposes. It was also set up that the forms prescribed by the constitution were not observed in the passage of this bill, but this defence was not insisted upon.

Under our practice it is not necessary to file a formal replication to the return of the respondent, but it is considered as traversed.

The relators insisted in argument that the return of the auditor is insufficient, because he was called upon to perform a mere ministerial duty, and he cannot justify his refusal by setting up the unconstitutionality of the act imposing that duty upon him.

Perhaps it would have been better to have urged this objection in the form of a motion to quash the return, but in granting this prerogative writ, the courts are not disposed to insist upon technicalities.

The objection is serious when the laws impose specific duties upon public officers, in the performance of which they are not to exer-

56 cise discretion. The courts are disposed to look with disfavor upon an excuse for non-performance based upon the opinion of such an officer, that in his view, the law is invalid. Still I do not think that an invariable rule has been established that such a return is insufficient in all cases; especially it seems that the auditor of public accounts can urge in a case like this that the constitution has been violated.

He is the book'eeper of the State—he is more—he is its business manager.

In his office are kept the accounts of its debts and credits. The nature of his office, which is of so great importance that it was established by the constitution, imposed upon him the duty of protecting the State from fraud. It is true that he is obliged to audit all claims against the State not required to be audited by some other officer, but of course legal claims are implied.

But if any difficulty is presented in this objection, it is obviated by the fact that the State of Louisiana in her sovereign capacity, through the attorney general, has intervened and joins with the respondent in urging the unconstitutionality of the act aforesaid.

57 To this intervention the relators have also excepted in this instance formally in writing. The exception was overruled. Whether an intervention can be filed in such a case will here be presented directly to the supreme court. The relators urge that the State ought not to be allowed to intervene, because the writ issues in the name of the State; but this is a technical formality. Indeed all processes issue in the name of the State, and yet she is not prevented from asserting her rights in the courts.

But it is insisted that the State is estopped from urging the unconstitutionality of its own act; of a law binding upon all the officers of the government.

This argument proceeds upon the assumption that the sovereignty of the State is vested in the legislature. Such is not the fact. The State, as a judicial being—exists separate from the departments of the government.

The State is not bound by either department when acting outside of the constitutional sphere assigned to it.

It is the duty of each department to resist the unconstitutional acts of the other. If the executive should presume to pass judgment upon a citizen, and to execute it, he would be brought before the high court established by the constitution for his trial.

58 If the legislature enacts a law without constitutional authority, it is the duty and the prerogative of the courts so to declare when a case is presented to them. If a court presumes to act beyond its judicial sphere, the judge may be impeached and condemned, or ignominously dismissed from his office without impeachment.

In a case like this, the attorney general appears specially as the agent of the executive branch of the government, to see that the laws are executed. But the constitution is a law enacted by the people—the paramount law. The officers of the government must see that this organic law is first enforced.

I therefore conclude that the objection to the return made by the auditor, and the exception to the intervention of the State, based upon the assertion that the validity of the act aforesaid cannot thus be inquired into, are untenable.

I proceed then to consider the case, with view to two important questions of constitutional law presented.

First. Does the act No. 32, aforesaid, violate the third amendment to the constitution of the State?

Second. Did the legislature otherwise exceed its constitutional power in the enactment of the said law?

59 During the first three sessions of the legislature, under the present constitution, the debt of the State was rapidly and greatly increased. Bonds were issued to rebuild the levees, which had been neglected or swept away during the war. Bonds were issued to aid works of internal improvement. Bonds were issued to fund the floating debt, until reflecting men began to fear that the burden of taxation necessary to meet the interest would become unbearable. To check the apprehended evil, an amendment to the constitution was submitted to the people, with the hope of giving confidence in financial circles, and enhancing the values of State securities.

The amendment was almost unanimously adopted at the general election in 1870. It is in the following language:

"That, prior to the first day of January, 1890, the debt of the State shall not be so increased as to exceed twenty-five millions of dollars."

Since this case was submitted, counsel for relators handed me a supplemental brief, calling attention to what it is said is an informality in the passage of the act submitting this amendment. It is too

60 late to urge the point here, and if it were before the court, the theory I have adopted would render it unnecessary to pass upon its effect.

In considering the point now under discussion, it is first necessary to ascertain whether the appropriation made by the act No. 32, aforesaid,

increases the "debt of the State" within the meaning of the amendment of the constitution above cited.

In the argument and determination of constitutional questions it may be hard, but it is necessary to rise above the impulses of the hour.

It will not do for courts to give an interpretation in order to meet the exigencies of the case. Here it is urged with force and eloquence that the debt has reached a limit which cannot be exceeded without ruin to the people. The court is therefore asked to declare that *that* the legislature has no power to make further appropriations, except for certain purposes.

The same rules which are applied in the construction of statutes are resorted to in the interpretation of constitutional provisions.

Considering this amendment in the light of that rule which requires you to ascertain the intention of the law-maker, I do not
61 think that it can be considered as limiting the power of the legislature in making appropriations for the purposes of the government.

Such appropriations do not, in my opinion, increase the debt, in contemplation of the third amendment.

The annual revenues of the State are supposed to be sufficient to meet the expenditures, and in speaking of the State debt we do not have reference to such floating obligations as unsettled warrants, but to the funded debt, or obligations not expected to be met by the current receipts.

I have no doubt that such was the intention of every man who voted for the amendment, either in the legislature or at the polls.

With this view, it becomes unnecessary to further examine the question of the constitutional limitation or present extent of the State debt.

2d. I now proceed to the consideration of the second question presented in this case.

The question *in* involved in the proposition of counsel for respondent, and for the State, who insist that the act for the relief of J. O. Nixon, makes a pure and simple donation to him; that at the time it was passed, the State did not owe him a dollar; and that the legisla-
62 ture had no constitutional power to "make donations to individuals for private purposes."

One who studies the judicial history of the United States will be struck with the fact, that the courts have always been extremely unwilling to condemn, or even criticise the acts of the executive and legislative departments. Judges have understood that the existence of our system of government depends upon the maintainance of the equality and independence of the co-ordinate branches. Perhaps, too, they have fully appreciated the fact, that unless they were willing so to accord the entire independence of the other branches, that they would be powerless to perform the duties imposed upon them by the constitution, while the judiciary department in purview of the constitution, is the equal of the others. Still it is the weakest; it is indeed powerless.

And yet, to the glory of our country, it can be said that her judges have seldom flinched from their duty of sustaining and defending the rights of the citizen when assailed. I do not loose sight of those views.

Upon my mind there is not the shadow of a doubt that the act No. 32, aforesaid, is simply a donation of $50,341.46 to James O. Nixon.

In arriving at this conclusion, I do not go beyond the face of
63 the law. Aside from the claptrap contained in the preamble, the bill declares that Nixon, who was once public printer, and who

was paid for his work by checks upon the treasury, shall now receive the aforesaid amount of money to compensate him for losses sustained by him in selling his warrants at a discount.

Here the legislature renders a judgment against the people of the State for fifty thousand dollars, and orders its execution upon a claim which would be summarily dismissed by any court in the civilized world. The State has paid these warrants in full. The money has been collected for that purpose by taxation.

Nixon was paid in full, as the preamble in this bill states, "for he who accepts notes and sells them, discharges the debt." (5 Johnson, 73; 1 Cowan, 303; 5 Barbour, 408.)

An individual can have no superior claim upon a contract with the State, than an individual. (3 Selden; 15 Peters, 377.)

We are now brought to the consideration of the important proposition involved in this case. Has the legislature the constitutional power to appropriate money for private purposes, which has been raised by taxation?

64 The examination of the question will necessarily involve the determination of the extent of the constitutional authority of the judiciary to pass upon such an issue.

The nature of American constitutional government has been so often and so ably discussed by the learned judges and distinguished publicists of our land, that there remains little to be said. From these reports and writings we ascertain that certain principles and rules have been definitely and indisputably established.

Among our early judicial writers, the Constitution was often spoken of as an expression of the social compact, which was supposed by the French philosophers of the eighteenth century to be the basis of government.

The proposition was even then discussed whether the judiciary could declare an act void because it violated "the fundamental principles of right and justice inherent in the nature and spirit of the social compact." "It may be well doubted," says Chief Justice Marshall, in Fletcher vs. Peck, "whether the nature of society and of govern-

65 ment does not prescribe some limit to legislative power."

Perhaps in this day we have a more practical and more correct understanding of the nature of government than was entertained by the earlier writers who were much under the influence of the abstract ideas which actuated the French revolutionists.

We now consider constitutional government as an outgrowth of modern civilization; as the defined but still expanding line-mark of nationality; as the original charter of the people's liberty with the amendments not yet completed.

But if at first, in the desire to protect national life and personal liberty, there was a struggle to find some limitation upon the authority of government in the nature of the social relations, so to-day it is declared that our notions of modern liberty preclude the idea that government can exist for any other purpose than the welfare of the public—that the power delegated to the government can be used for any private advantage.

66 When the colonies severed their connection with England they became possessed of the full powers of the British Parliament.

These powers were supreme and unlimited. Without pausing to consider the history of the formation of the American Government, it is enough to notice that the people established the dual system, made up of the then existing governments of the new States and the Federal or

National Government. The Government of the United States is one of enumerated powers, the National Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the National Government assumes to possess.

In this respect it differs from the constitutions of the several States. (Cooley, p. 9,) On the other hand, all of the sovereign powers which are inherent in the people, and which were not delegated to the Government of the United States, are vested in the State governments.

In Great Britain Parliament is vested with the law-making power or legislative power without any restriction or limitation.

67 It has been said that this claim to omnipotence rests upon the fact that Parliament is unfettered and unrestricted by a written constitution expressive of the will of its constituents; that it stands in the place of the people, and speaks the language of absolute sov'eignty. (Smith on Constitutional Construction, sec. 293.)

This absolute power of Parliament has been questioned. Lord Coke declared that the common law doth control the acts of Parliament, and adjudges them void when against common right and reason. (8 Coke, 118.)

This view was commended by Lord Chief Justice Holt. (12 Modern, 687.)

So Lord Chief Justice Hobart insisted that a statute made against natural equity, as to make a man judge in his own case, was void.

This, however, is not the settled rule at common law.

The weight of opinion is that an act of Parliament cannot be questioned in the courts; that it imports absolute verity, and is the "exercise of the highest authority that the Kingdom acknowledges upon earth."

68 Still, the bold expressions of the bold jurists named indicate that in England, and long ago, there were men who could apprehend the fact that the evolution of Anglo-Saxon liberty was producing a civilization whose corner-stone should be that governments only exist for the benefit of all the people.

In the system of representative government which has been developed in our own country, the legislative, executive, and judicial powers are organic and co-ordinate. Neither is absolute, nor are they all. This is the political life of the age whose history is written in constitutional enactments, which have been declared from time to time.

The legislative power is divided up between the Congress of the United States and the legislatures of the several States.

Congress exercises legislative power only so far as authority has been delegated in the National Constitution.

"The Federal Government can do nothing but what is authorized expressly or by clear implication."

He who maintains the validity of a law of Congress must show the authority to enact it. It is not necessary here to notice those powers. It may not be improper, however, to say that, in consonance with the idea that constitutions grow, the student will observe the expansion of the legislative and judicial authority un' the National Government.

69 Whatever power is necessary to protect the citizens of the republic or to aid in developing the resources of the country is cheerfully granted by the people.

The residium of the law-making power is reserved to and vested in the legislatures of the several States.

This authority is fundamental, and not unlike that vested in Parliament.

True, the powers of the legislature do not extend to the exercise of the executive or judicial authority; true, the Federal Constitution prohibits, expressly, the exercise of certain powers, and, by implication, others; true, that the constitution of every State in the Union contains numerous specific restrictions and limitations expressive of the great principles of the Magna Charter, and of modern liberty. Still, as Mr. Chief Justice Black said in the celebrated case of "Sharpless vs. Philadelphia," "Beyond this there lies a vast field of power grat'ed to the legislature by the general words of the Constitution, and not reserved, prohibited, or given away to others. Of this field the general assembly is entitled to full and uncontrolled possession.

"Their use of it can be limited only by their own discretion.

70 "The reservation of some powers does not imply a restriction on the exercise of others which are not reserved. On the contrary, it is a universal rule of construction, founded in the clearest reason that the general words of any instrument or statute are strengthened by exceptions and weakened by enumeration.

"To me it is as plain that the general assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the Federal Constitution, as it is that the people have all the rights which are expressly reserved." (21 Pa., 168.)

This rule has often been declared by our own supreme court. In the case of the State vs. Volkman, the court said: "The theory of our form of government is that the legislature, in its sphere, is supreme in all respects, save when restricted by the constitution of the State or of the United States, and may do anything not prohibited by such authority." (20 An., 585.) These words were quoted with approval, by the court in the case of The State vs. Fagan, (22 An., 545.)

But when is the legislature within "its sphere" and who is to determine? This the problem.

71 It is a fact which the historian of constitutional government will note, that the men who have been celebrated as jurists in England and America have been unwilling to admit that the legislative power has no limitation in its own nature, and in the nature of the government. We have seen what Lords Coke, Hobart, and Holt declared even of the power of Parliament—that Parliament to which the King and his ministers are subservient; even where the House of Lords dare not pass a law insisted upon by the House of Commons.

We have seen how Chief Justice Marshall "doubted whether the nature of society and of government does not prescribe some limits to the legislative power."

These "doubts" run through all their early decisions. In the case of Caldee vs. Bull, (3 Dallas, 386,) Justice Chase, while admitting the full and unrestricted powers of State legislatures within their spheres, said:

"The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence.

72 "The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.

"The nature and ends of legislative power will limit the exercise of it.

"An act of the legislature, (for I cannot call it a law,) contrary to the

first great principles of the social compact, cannot be considered a rightful exercise of legislative authority.

"The genius, the nature, and the spirit of our State governments amount to a prohibition of such acts of legislation."

Such expressions might be quoted from numerous other cases. Mr. Smith, in his work on statutory and constitutional constructions, after considering the subject, remarks that "the weight of authority seems to preponderate the scale in favor of the doctrine that there are restrictions upon the legislative power growing out of the nature of the civil contract and the natural rights of men, independent of any written constitutional restrictions, and certain limits beyond which that power cannot be lawfully called into exercise, (148)

73 Other authors and judges have expressed their opinions in a general way, but have held that the courts have no authority to interpose to check the legislature. Yet it will be found that, when the decision or the article has been prepared in full view of the whole subject, *that* a certain limit is "hinted at" as our supreme court remarked, at which it would become the judiciary's duty to interfere.

In the recent able work of Mr. Justice Cooley on constitutional limitations, he says, in considering the subject of his book, that there are other limitations upon legislative authority than those prescribed in the Constitution, "from the very nature of free government." Among these restrictions, he remarks the inhibition to raise taxes or appropriate the public money except for public purposes. These, however, are matters of legislative wisdom, discretion, and conscience.

This discretion of the legislature cannot be controlled by the courts, "except, perhaps, where its action is clearly evasive, and where, under pretence of lawful authority, it has assumed to exercise one that is unlawful."

74 In the supreme court of our own State, in the case of Oakey vs. Mayor et al., (1 Louisiana, 11,) Judge Porter, in sustaining the constitutionality of an ordinance of the city of New Orleans laying a tax, remarked: "Because a law might be passed plundering a citizen under the pretense of raising a revenue, and therefore void, it does not follow that all inequality in taxation draws with it the same consequence." And again he remarks, "It is not necessary for us to say in this case whether there are not in the constitution of every free country certain fundamental principles, under which the citizen can find shelter and protection in extreme cases. We will think of that when a case arises which requires us to do so."

So in the celebrated drainage-tax cases, reported in the II An., Judges Spofford and Ogden admitted that, perhaps, a court might arrest legislative action, although not directly or impliedly unconstitutional, in a case of flagrant wrong.

Thus we find that the way has been prepared by far-seeing jurists—for the decisions which public sentiment indicates will 'evitably be rendered throughout the land. But there are cases, intimately allied in principle with this, in which the subject has been more fully discussed.

75 In the leading case of Sharpless vs. Mayor of Philadelphia, above referred to, Chief Justice Black was the organ of the court in rendering the opinion, sustaining the constitutionality of an act authorizing the city of Philadelphia to subscribe to the stock of a certain railroad corporation.

The law was contested, among other reasons, because it was said to

impose the burden of taxation for a purpose not warranted by the Constitution.

Judge Black considered the nature of the taxing power, and quoted Chief Justice Marshall, in the case of McCullock vs. Maryland, (4 Wheaton, 428,) who declared that there was no limit to the power of taxation.

Judge Black, however, uses the following significant language:

"But I do not mean to assert that every act that the legislature may call a tax-law is constitutional. The whole of a public burden cannot be thrown upon a single individual under pretence of taxing him. These things are not excepted from the powers of the legislature because they did not pass to the assembly by the general grant of legislative power.

"A prohibition was not necessary. An act of the assembly commanding or authorizing them to be done would not be a law."

76 Again, he remarks, in the same case: "I am of the opinion of the supreme court of Kentucky, (9 B. Monroe, 345,) that a tax law must be considered valid unless it be for a purpose in which the community taxed has palpably no interest; when it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at the first blush.

"Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporations to do it in order to raise funds for a mere private purpose.

"No such authority passed to the general assembly by the general grant of legislative power. Taxation is the mode of raising revenue for public purposes.

"When it is prostituted to objects in no way connected with the public interests or welfare it ceases to be taxation and becomes plunder."

There are some cases, decided since the war, to which my attention has been called. They arose under acts of the legislatures authorizing a tax to be collected in certain towns for the reimbursement of money paid to obtain recruits for the war. The tax was, in each case, sustained, but upon the distinctly-expressed opinion that the impo-

77 sition was for a public purpose. If it had been otherwise the laws would have been void. (Tyson et al. vs. School Directors, &c., 51 Penn., 9.)

In this case the court remarked that a law imposing a tax for a private purpose would much more resemble an imperial rescript than constitutional legislation. (Booth vs. Town of Woodbury, 32 Connecticut, 118; Freeland vs. Hastings, 10 Allen, (Mass.,) 570.)

In this case the doctrine was clearly announced that the legislature has no power to impose a tax which would inure to the exclusive benefit of private or particular individuals.

"It is hardly necessary to say that a statute designed to accomplish such purposes would be against common right, and would trans'end the authority conferred on the legislature by the constitution."

So Mr. Justice Cooley, after reviewing the nature of the taxing power, after conceeding its far-reaching extent, and after finding that the only limitation beyond the express restrictions of the constitution is that the levy must be for a public purpose, remarks:

"There are cases when it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the rights of the courts to interfere to check what can only be looked

78 upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief.

"An unlimited power to make any and every thing lawful which the legislature might see fit to call taxation would be, when plainly stated, an unlimited power to plunder the citizen." (Constitutional Limitations, p. 487.) So again, he says: "When, therefore, the legislature directs the levy of a tax for a purpose not public, and which cannot be properly made a public burden, we must conclude that they are exercising an authority not conferred in the general grant of legislative power, and which is, therefore, unconstitutional."

These principles were clearly announced by Judge Cooley, as the organ of the supreme court of Michigan, in the case of The People, ex rel. The Detroit & Howell Railroad Company, vs. The Township Board of Salem, recently decided, (American Law Review, October, 1870, p. 126;) also, by Chief Justice Dillon, of the supreme court of Iowa, in the case of Hanson vs. Vernon, 1869, (1 American Reports, 215,) and, subsequently, by Judge Dillon, in 1871, from the bench of the circuit court of the United States, district of Iowa, (Chicago Law Journal, January 28, 1871.)

These decisions have been severely criticised, because they de-
79 termine that act authorizing municipal aid to railroads involved taxation for private purposes.

Another important case was decided by the supreme court of Wisconsin, in 1869. The legislature authorized the town of Jefferson to raise a tax for a private educational institution. It was contested.

Chief Justice Dillon said:

"It strikes us a' the first blush that this is not the levy and collection of money for public purposes. It is not the kind of public benefit and interest which will authorize a resort to the power of taxation."

And so the law was held invalid, because the public had no interest in the object for which the money was proposed to be raised.

The court cited the case of Philadelphia vs. Wood, (39 Pa.,) as sustaining the principle.

In the hurri'd collection of these authorities I have been obliged to select at random.

Numerous other cases and authors could be cited if time and space would permit.

I think, however, that the doctrine has been clearly established that there are limitations upon the power of the legislatures of the States beyond the explicite restrictions imposed by the constitutions and
80 the Constitution of the United States; that these limitations arise out of the nature of the "legislative power" vested in the assemblies by the State constitutions.

I believe that the weight of recent authority will sustain the position that the courts are bound to declare invalid any act which "at first blush"—upon its face—appears to have been passed, not for public purposes, not for the good of the people, but for the private advantage of one or more persons.

Is the law No. 32, under which these relators claim, such an act? I have already said that I have no doubt, judging alone from the face of the statute, that it makes a simple donation to Mr. Nixon, and that the people have no interest or advantage in the disposition.

The question then arises *Is* there any difference in principle between an act making an appropriation out of the public treasury and an act levying a tax?

It is clear to me there is none. The unlimited power of taxation for public purposes is conceded. Here the legislative discretion is alone to determine.

But, therefore, a tax can be levied and collected, of one, two, or three per cent., "for the purpose of sustaining the government of the
81 State;" and, then, if this money can be used for the private advantage of the beneficiaries of the legislature, the evil would be none the less.

Experience in this country proves to what fearful corruption this power would lead. If a sufficient majority of the members of the general assembly can be got together in a "ring," they can agree to pass any bill, and the whole revenue of the State could thus be diverted to the purpose of enriching the members.

I do not think that the courts in this country could be induced to decide that, in the exercise of the law-making power, the legislature has the constitutional right to rob and steal, either for the advantage of the members or for others.

The views I have here expressed lead me to the following conclusions:

1st. That the auditor, as the general accountant of the State, may properly decline to issue his warrant upon the treasury for a claim which appears to him to be illegal or invalid.

2d. The State, by the att'y general, may properly intervene in a mandamus suit which has been instituted to compel the state auditor to warrant upon the treasury in payment of a claim against the
82 State. In such intervention the State may urge the unconstitutionality of an act of the general assembly.

3d. An appropriation made by the legislature, in the exercise of the legislative power, which is to be paid out of the general funds to be derived from the current revenues, is not an increase of the debt of the State, in contemplation of the third amendment to the constitution of the State. The act under which relators claim is, then, not a violation of the article of the constitution limiting the debt of the State to twenty-five millions.

4th. The act of the legislature entitled "An act for the relief of J. O. Nixon, late state printer," is, upon its face, a bill appropriating money out of the public treasury exclusively for a private purpose. The people of the State, for whom the assembly exercise the legislative power, have no interest and can derive no advantage from said appropriation, but are, nevertheless, required to pay it from the taxes levied upon their property.

5th. That while the general assembly of the State is vested with full legislative power, under the restrictions of the Constitution of the
83 United States, and the limitations imposed by the constitution of the State; that while, in the exercise of this power, their actions cannot be controlled except by their own discretion and wisdom, there are still certain other limitations imposed upon the exercise of that power by the very nature of the power itself.

The legislative power implies acts for the public welfare and advantage.

That, although the assembly is sole judge as to how it shall administer its powers for the public good, still if an act is passed which, at "first blush," clearly appears to have been enacted for the private advatage of one or more persons; if it clearly appears that the public have no interest in such an act, and that it imposes a burden upon the citizens of the State, it will be the duty of the judiciary to declare the same void, because no authority to pass such an act was vested in the legislature by the grant of legislative power contained in the constitution.

That, however, such judgment can only be rendered in a case properly before the court.

Therefore, the act No. 32 aforesaid, is unconstitutional and void.

84 *Judgment.*

In this case, submitted to the court for determination, after deliberation, and for the reasons assigned in the written opinion this day delivered and filed, the court, considering the law and the evidence to be in favor of the respondent, it is ordered, adjudged, & decreed that the writ of mandamus herein prayed for be refused, at relators' cost.

Judgment rendered Ap'l 5, 1871.

Do signed April 5, 1871.

(Signed) HENRY C. DIBBLE, *Judge.*

Motion for new trial.

STATE OF LA., EX REL. SOLOMON & SIMPSON, *vs.* JAMES GRAHAM, STATE AUDITOR. } No. 448.

Eighth district court, parish of Orleans.

On motion of Labatt & Aroni, atty's for relators, to grant a new trial, on the ground that the judgment rendered is contrary to law & evidence, the motion was overruled.

Filed April 5th, 1871.

Motion for a devolutive appeal.

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson, *vs.* JAMES GRAHAM, STATE AUDITOR, STATE OF Louisiana, intervenor. } No. 448.

85 Eighth dist. court, parish of Orleans.

On motion of Labatt & Aroni, counsel for relators, made in open court, def'ts and intervenors being present and taking cognizance thereof, it is ordered that a devolutive appeal be granted to the relators, returnable to the supreme court of Louisiana, sitting in New Orleans, on or before the third Monday of April, A. D. 1871, upon appellants' furnishing bond, with security conditioned according to law, in the sum of five hundred dollars.

Filed April 5th, 1871.

Act No. 33, *of the legislature of* 1870.

An act for the relief of Ja's O. Nixon.

SECTION 1ST. *Be it enacted by the senate and house of representatives of the State of Louisiana in general assembly convened,* That the auditor of public accounts be, and is hereby, authorized to audit and draw a warrant on the State treasury in favor of James O. Nixon, for the sum of

forty-seven hundred and ninety-two dollars, being amount due him on contract while state printer.

SECTION 2D. *Be it further enacted*, &c., That this act shall take effect from and after its passage.

Bond of appeal.—Filed April 11, 1871.

Know all men by these presents that the State of Louisi'na, ex relatione Solomon & Simpson, as principals, and B. B. Hart, as sureties, are held and firmly bound unto Thomas Lynne, clerk of the eighth district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of five hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated in the city of New Orleans, on this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-bounded Solomon & Simpson, ex rel. State of Louisiana, have obtained an order of appeal from a final judgment rendered against them in the suit of The State, ex rel. Solomon &
87 Simpson, vs. James Graham, state auditor, The State of Louisiana, intervenor, No. 448, in the eighth district court for the parish Orleans, on the 5th day of April, 1871, and signed on the fifth day of April, 1871:

Now the conditions of the above obligation is such, that the above-bounden Solomon & Simpson shall prosecute their said appeal, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise that the said surety shall be liable in their place.

(Signed) SOLOMON & SIMPSON.
(Do.) B. B. HART.

Signed, sealed, and delivered in the presence of—
P. T. SIMPSON.

Clerk's certificate.

I, Thomas Lynne, clerk of the eighth district court for the parish of Orleans, and as such duly commissioned and sworn, do hereby
88 certify that the foregoing one hundred and thirty-two pages do contain a true and correct transcript of all the proceedings had, all the documents filed, and testimony and evidence adduced, (except documents M and E, offered in evidence, which are embodied in the annual report of the state auditor of public accounts to the general assembly, session of 1871, and which said auditor's report accompanies this transcript,) made part hereof, on the trial of the cause wherein The State of Louisiana, on the relation of Solomon & Simpson, *are* plaintiffs, and James Graham, state auditor of public accounts, is defendant, the same being numbered 448 of the docket of the eighth district court for the parish of Orleans.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, in the city of New Orleans, this 15th day of April, in the year of our Lord one thousand eight hundred and seventy-one, and in the 95 year of the independence of the United States.

[SEAL.] (Signed) THOMAS LYNNE, *Clerk.*

89 Supreme court of the State of Louisiana.

Order to place case on summary docket.

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, STATE AUDITOR STATE OF Louisiana. } No. 3358.

The clerk is politely requested to fix the case of Solomon & Simpson vs. Graham, State of La., int., on the summary docket, according to law.
April 17th, 1871.

(Signed) LABATT & ARONI.
ALEX. WALKER,
For Pl'ff's.

Filed April 17th, 1871.

Agreement of counsel.—Filed May 8th, 1871.

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, STATE AUDITOR STATE OF Louisiana. } No. 3358.

The document, "public debt statement," found on page 81, of the record, was not offered in evidence, nor does it form a part of the evidence offered in this case. It was a statement prepared by one
90 of the counsel for the auditor, and read by him in argument, and the court was referred to it for the purpose of facilitating the investigation.

(Signed) HORNOR & BENEDICT,
For Auditor.
(Signed) LABATT & ARONI,
For Relators.

Case submitted.—Extract from minutes, Tuesday, May 9th, 1871.

The court was duly opened—present, their honors John T. Ludeling, chief justice, James G. Taliaferro, Rufus K. Howell, W. G. Wyley, William W. Howe, associate justices.

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, STATE AUDITOR. } No. 3358.

This case was called for trial, and having listened to argument
91 from Julius Aroni, esq., of counsel for the plaintiffs & appellants, and Thomas J. Semmes, esq., of counsel for the defendant, appellee herein,
The court took the same under advisement upon the briefs for both parties, and the papers now on file.

Opinion and decree.—Filed May 22nd, 1871.

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, AUDITOR OF THE STATE OF Louisiana.
} No. 3358.

Mr. Chief Justice LUDELING:

The relators pray for a writ of mandamus to compel the State auditor to issue a warrant to them for fifty thousand three hundred & thirty-one $\frac{46}{100}$ dollars. They sue as the assignees of the rights of James O. Nixon, under an act of the general assembly of the State of Louisiana, passed on the first of March, 1871, and numbered 32.

The anditor alleged, as cause for refusing to issue the warrant,
92 that the act No. 32, of the general assembly of the State of Louisiana is unconstitutional.

And the State of Louisiana, represented by the attorney general, intervened in the suit, and denied the right of J. O. Nixon to a warrant, on the ground that the act No. 32, is unconstitutional, inasmuch as at the date of its passage, the debt of the State exceeded twenty-five millions dollars, and the general assembly was prohibited by the 3d amendment to the constitution of the State, promulgated in December, 1870, to increase the debt of the State, after it had reached that sum.

To this intervention the relators excepted, on the following grounds, to wit:

1st. That this is not such a case as authorizes the intervention of the State to prevent the issuance of the warrant demanded under act 32 of the legislature of 1871.

2d. That the State is estopped by the terms of the act itself from appearing herein for the purposes set forth in the petition of inter-
93 vention, and in law is estopped from disputing the validity of its acts duly passed according to law, and binding upon all officers of the government.

3d. That the intervention discloses no cause of action.

I. An intervention is a demand by which a third person requires to be permitted to become a party to a suit between other persons; either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claim of the plaintiff. (Code of Practice, 389.) In order to be entitle' to intervene, it is enough to have an interest in the success of either of the parties to the suit. (C. P., 389.)

Is the proceeding instituted by the relators against the auditor a suit? We think it is. Has the State an interest in the success of either of the parties to the suit? Unquestionably she has. We can perceive no reason why the State should be denied the right to intervene to
94 prevent her agent from being compelled to do an act, which she avers is unauthorized by law. (22 An., 366, State, ex rel. Burbank, &c., vs. Dubuclet, state treasurer.)

II. If the doctrine contended for by the relators be correct, the amendment of the constitution fixing the limit of the State debt, would practically be without effect, whenever the legislature inadvertently or designedly, disregarded its provisions. The doctrine of estoppel is utterly inapplicable to a case like this.

III. The State is interested in enforcing the provisions of the constitution, and in resisting the claim of the relators.

The judge a quo correctly overruled the exception, and permitted the intervention. It is unnecessary, therefore, to decide whether the auditor had any discretion relative to issuing the warrant in question.

On the merits the question presented is the constitutionality or unconstitutionality of the act of the general assembly, passed
95 1st March, 1871, and numbered 32.

The solution of this question depends upon two facts; did the debt of the State of Louisiana exceed twenty millions of dollars, at the date of the act of the legislature aforesaid, and did the said act create a debt?

The evidence in the record leaves no doubt that the debt of the State exceeded twenty-five millions of dollars on and before the 1st day of March, 1871.

The total amount of bonds of the State issued at that date was	$22,560,233 00
The total amount of debts other than bonds, on 31st Dec., 1870, was	$2,461,501 40
Total debt on 31st Dec., 1870	$25,021,734 40
Between the 31st Dec., 1870, and 1st March, 1871, the increase of warrants and certificates was	552,174 14

But if we concede, what is not true, that the uncollected back taxes would absorb the warrants and certificates of indebtedness, still there is no room to doubt that the debt of the State largely exceeded
96 the limitation of the constitution on the 1st day of March, 1871.

The remaining bonds of the State, in favor of the Mississippi Mexican Gulf Ship Canal Company, to be issued, under act No. 116 of the general assembly of 1869, amounted to	$126,000 00
The remaining bonds of the State, in favor of the North Louisiana and Texas Railroad Company, to be issued under act No. 108 of the general assembly of 1868, is not less than	594,000 00
The bonds of the State, in favor of the New Orleans, Mobile & C'attanooga R. R. Company, to be issued under the 7th section of act No. 31 of the general assembly of 1870, equal	$3,000,000 00
Total amount of bonds to be issued	$3,720,000 00
Total amount of bonds issued	22,560,000 00
Total amount of bonded debt	$26,280,000 00

97 Besides this the State has obligated itself to endorse the bonds of the N. O., Mobile & C'attanooga R. R. Co., and the N. Orleans, Baton Rouge and Vicksburg Railroad Company to the extent of $12,500 per mile of each of said railroads, as they are completed.

It is contended that the bonds issued in favor of the property-banks, amounting to $4,839,933.33, should not be computed as debts of the State, because they are amply secured by the assets of the banks, and because the accrued interests thereon have been promptly paid by the banks. It is well known, especially in this country, that persons, natural and artificial, frequently fail in business; and from affluence they are suddenly reduced to insolvency. The present ability of the property-banks to meet their liabilities is no guaranty that the State

will not eventually have to pay her bonds, issued to aid said banks, and much less is it a reason to say that the said State bonds should
98 not be computed as a part of the debt of the State. If it had been intended to exclude these bonds or others in the computation of the debt of the State, limited by the constitution, it would have been done in express terms.

In the case of The City of Baltimore vs. Gill, (31 Md.,) the court held that a temporary loan made to the city, made on a pledge of railroad stock owned by the city, was a debt notwithstanding it was stipulated in the contract that the city was exempted from all personal liability, and that the lender should look alone to the pledge for payment. In that case the city of Baltimore had attempted to evade a constitutional provision, by which the debt of the city could not be increased, except on the joint assent of the legislature and of the people by a vote.

It is also insisted by counsel that "the indebtedness of the State can only be ascertained from the amount of the outstanding liabilities, for the payment of which, part of the principal and the annual in-
99 terest, the authorities must provide and raise a revenue; but obligations or promises to issue, hereafter, bonds to railroads, when they are built, and which, perhaps never will be built, do not constitute an indebtedness, because the State need not provide to pay a part of the principal and the interest on the bonds, which do not exist. And if the State is ever called on to issue such bonds, they will be amply secured by mortgages, which will be at least an equivalent, and consequently an asset to counterbalance the liability."

The fallacy of counsel consists in assuming, 1st, that a conditional obligation is no obligation; and 2dly, that the promissory note of A, secured by a mortgage on the property of B, is not a debt of the maker, A, because it is secured. Both positions are untenable.

"Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition," &c. (C. C., 2021.)

The condition being complied with has a retrospective effect
100 to the day that the engagement was contracted; if the creditor dies before the accomplishment of the condition, his rights devolve on his heirs," (C. C., art. 2041.) "And the creditor may, before the fulfillment of the condition, perform all acts conservatory of his rights," (C. C., art. 2042.)

Thus the obligations of the State, in relation to the railroad companies aforesaid are suspensive and potestative conditional obligations. The State is a debtor to those companies, and the fulfillment of the conditions will have a retrospective effect to the time when the engagement were contracted. For example, when the Mississippi and Mexican Gulf Ship Canal Company will have completed the construction of the lock on said canal, the company will be entitled to demand the bonds of the State for $126,000, and when issued, it will not be denied, the bonds will form a part of the debt of the State. But when and how was the debt created?

It is clear. it was created by the act of the legislature in 1869.
101 The law on this subject is the same in the other States of this Union. "A party bound by either an express or an implied contract, in virtue whereof he may become liable to the payment of money, is a debtor, although his liability be contingent." (5 Barb., 410; 18 Wend., 375, 386; 5 Cowen, 67; 8 Cowen, 427, and 4 Greenl., 195.) The reasoning of Chief Justice Mellen seems conclusive. "The objection is that Van Wyck was not a creditor of Seward at the date of the deed

because it was then uncertain whether he would have a cause of action on that covenant. Let us see where this doctrine would carry us. If one promise to pay money at a future day, he may pay before the credit expires, and, until that times arrives, it is uncertain whether an action will ever accrue on the promise. The contract of surety only creates a contingent liability. Until the principal is in default, it is uncertain whether an action will ever accrue against the surety. The drawer of a bill of exchange is only bound to pay it upon a contingency, which may never happen; and so it is with the endorser of negotiable
102 paper of all kinds. The contract of indemnity is another case where an action may never accrue upon the undertaking. In these, and all other cases depending upon contract, the person with whom the engagement is made is as much a creditor, within the meaning of the statute, as though he had a debt on which a right of action already existed."

Did the appropriation, made in favor of J. O. Nixon, create a debt against the State, or was it only a recognition of a debt existing prior to the constitutional amendment and unaffected by it?

The preamble to the act recites that, "whereas the State of Louisiana, by act of March 22d, 1866, and by her contract with James O. Nixon, as public printer, engaged to pay him in cash monthly certain rates and prices for public printing by him to be executed; and whereas said Nixon executed his bond for ten thousand dollars to the State for the faithful performance of his duties as public printer; and whereas the said Nixon did faithfully and promptly execute the duties incumbent
103 on him by law; and whereas the State paid him only part in cash and the remainder in warrants which he was compelled to receive or get nothing at all; and whereas, to comply with his engagements to the State, he was compelled to sell these warrants at various and heavy discounts; and whereas good faith of the State requires that it should make good the losses incurred," &c.

It appears, from these recitals, that the State had settled with J. O. Nixon in full for the work done by him as public printer, and that his necessities compelled him to sell, at a discount, his warrants received in the settlement. If, instead of the State, it had been a private individual, who had contracted with Nixon, and who had given his note in settlement, could Nixon have enforced his claim for losses in consequence of the sale of the note? Certainly not. After the settlement aforesaid and the sale the warrants, the State did not owe Nixon, but the holder of the warrants. Therefore the act No. 32, if valid, necessarily created a debt.

But it is contended by the relators that the appropriation does
104 not create a debt, "because the money is presumed to be in the treasury."

This raises the very serious question whether or not the legislature can make appropriations, unless there be money to meet the warrants authorized thereby, either actually in the treasury or provided for by the revenue bill?

The power of appropriation is the right to apply to public purposes money in the treasury. Article 104 of the constitution declares "no money shall be drawn from the treasury, but in pursuance of specific appropriations made by law." An appropriation is an authorization to the auditor to check upon the treasury for moneys there deposited.

If, therefore, the revenues be inadequate to meet the interest of the public debt and the current expenses of the necessary State agencies to preserve the government, an appropriation (whereby the liabilities of

the State are increased) for any other purpose than the support and maintainance of the machinery of government is a debt within the meaning of the constitutional amendment, which declares "that, prior to the 1st day of January, 1890, the debt of the State shall not
105 be so increased as to exceed twenty-five millions of dollars."

It is further contended that the prohibition in the constitutional amendment is inoperative until the legislature shall provide by law how to carry it into effect. And the case of Groves vs. Slaughter, reported in 15 Peters, 449, is relied on to support the position. The case is whol'y inapplicable.

That there are provisions of the constitution, which require legislative action to carry them into full operation, cannot be doubted, but it is equally certain that there are other provisions of the constitution, which are effective, independently of the action of the general assembly. This amendment does not require legislation to be operative. (13 Barb., 63 and 188.) It is a check upon the general assembly itself; and its efficacy is independent of the legislative will.

The proper way for the legislature to give effect to this amendment is not to pass laws for its enforcement, but to refrain from enacting
106 laws in violation of its commands.

The evidence shows that the revenues of the State are inadequate to the expenditures.

We are therefore constrained to declare that the act entitled "An act for the relief of James O. Nixon, late public ," passed at the general assembly of the State of Louisiana, on the first day of March, 1871, is unconstitutional, null, and void.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs of appeal.

Decree.—Extract from minutes, Monday, May 22d 1871.

The court was duly opened pursuant to adjournment.

Present, their honors, John T. Ludeling, chief justice, and James G. Taliaferro, Rufus K. Howell, W. G. Wyly, William W. Howe, associate justices.

His honor the chief justice pronounced the judgment and de-
107 cree of the court in the following case:

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, STATE AUDITOR STATE OF Louisiana.
} No. 3358.

On appeal from the eighth district court for the parish of Orleans.

It is ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs of appeal.

Application for rehearing.—Filed May 29th 1871.

THE STATE, EX RELATIONE SOLOMON & SIMPson,
vs.
JAMES GRAHAM, AUDITOR, STATE OF LA., INtervenor.
} No. 3358.

To the honorable the judges of the supreme court of the State of Louisiana sitting in New Orleans:

The relators in the case, styled "The State, ex rel. Solomon & Simpson, assignees of J. O. Nixon vs. James Graham, auditor, the State of
108 Louisiana, intervenor," respectfully ask for a rehearing on the grounds and upon the authorities stated in the printed brief to be filed herein, and pray for general relief.

(Signed) LABATT & ARONI,
Att'ys for Relators.

Abstract from the minutes, Monday, May 29th, 1871.

The court was duly opened, pursuant to adjournment.

Present, their honors, James G. Taliaferro, Rufus K. Howell, W. G. Wyly, William W. Howe, associate justices; absent, John T. Ludeling, chief justice.

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, AUDITOR, THE STATE OF LOUISIANA, intervenor. } No. 3358.

On motion of Julius Aroni, esq., of counsel for the relators, and upon suggesting to the court that he has filed a petition for rehearing in this case on the part of the said relators, and that an extension of time
109 is desired by him to prepare a brief in support of the said application.

It is ordered by the court that counsel for the relators be allowed until Wednesday the 31st instant, at 10 o'clock a. m., to prepare and file his brief on said petition.

Extract from minutes, Wednesday, May 31st, 1871.

The court was duly opened.

Present, their honors, James G. Talliaferro, Rufus K. Howell, W. G. Wyly, William W. Howe, associate justices; absent, John T. Ludeling, chief justice.

His honor Justice Taliaferro pronounced the judgment and decree of the court in the following case:

STATE OF LOUISIANA, EX REL. SOLOMON & Simpson,
vs.
JAMES GRAHAM, STATE AUDITOR, STATE OF Louisiana. } No. 3358.

It is ordered that the rehearing applied for in this case be refused.

110 *Certificate of the clerk.*

UNITED STATES OF AMERICA:

Supreme court E. D. State of Louisiana.

I, T. McC. Hyman, deputy clerk of the supreme court of the State of

Louisiana, do hereby certify that the foregoing one hundred and nine (109) pages, contain a true copy of the transcript of all the proceedings had in the eighth district court for the parish of Orleans, in a certain suit, wherein the State of Louisiana, ex rel. Solomon and Simpson, were plaintiffs, and James Graham, state auditor State of Louisiana, was defendant, and also of the proceedings had in this supreme court on the appeal taken by said plaintiffs, which appeal is now on the files thereof, under No. 3358.

In testimony whereof I have hereunto set my hand and affixed
111 the seal of said court, at the city of New Orleans, this fifteenth day of July, A. D. 1871, and in the ninety-sixth year of the independence of the United States of America.

[SEAL.]

T. McC. HYMAN,
Deputy Clerk.

112 SOLOMON & SIMPSON, ASSIGNEES OF J. O. Nixon, ex rela. State of Louisiana,
vs.
JAMES GRAHAM, AUDITOR, STATE OF LOUISIANA, intervenor.
} From the supreme court of Louisiana.

To the honorable the judges of the Supreme Court of the United States at Washington:

The petition of Solomon & Simpson, residents and citizens of Louisiana, respectfully shows—

That in the suit above, styled No. 448, of the eighth district court of the parish of Orleans, and No. 3358 of the supreme court of the State of Louisiana, a final decree was rendered by said supreme court of Louisiana against your petitioners, whereby they are deprived of their right to receive from the state auditor a warrant for $50,331.46; that they are, by said judgment, irreparably injured & aggrieved, and that they are advised and believe that there is manifest error of law and wrong therein to their prejudice and rights; and that said judgment is in violation of section No. ten, article first, of the Constitution of the United States; that they are desirous of having said judgment revised, reviewed, and corrected, by the Supreme Court of the United States by writ of error, upon their complying with the requisites, conditions, and stipulations of law in such cases, made and provided, & giving bond as the court may order & to its satisfaction.

Wherefore petitioners pray the court to grant them a writ of error, returnable to the Supreme Court of the United States, at its next term in Washington, D. C., on their giving bond according to law, and as the court may direct, conditioned as the law directs; and that
113 the due and proper notices, citations, & services, be made thereof on the defendant and the intervenor, or their counsel of record, according to law, and for all general & equitable relief.

LABATT & ARONI,
Att'ys for Petitioners.

Order.

A writ of error is allowed in this case as prayed for, and according to law, returnable to the Supreme Court of the United States on the first Monday of December next, at Washington, D. C., the petitioner giving

bond in the sum of one thousand dollars, with good & solvent surety, conditioned as the law directs.

New Orleans, June 13th, 1871.

JOS. P. BRADLEY,
Associate Justice Sup. C't U. S.

(Indorsed:) Solomon & Simpson, assignees of J. O. Nixon, vs. James Graham, auditor, State of Louisiana, intervenor. Petition of appeal to Supreme Court of United States & order. Labatt & Aroni, for pl'tffs. Sup. court of La. Filed June 14th, 1871. M. P. Julian, dep'y cl'k.

114 Know all men by these presents that we, Salomon & Simpson, as principals, and , as sureties are held and firmly bound unto James Graham, auditor, H. C. Warmoth, governor of the State of Louisiana, & Simeon Belden, attorney general of the State of Louisiana, in the full and just sum of one thousand dollars, to be paid to the said James Graham, auditor, H. C. Warmoth, governor, & Simeon Belden, att'y general, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas, lately, at a supreme court of Louisiana holding sessions in New Orleans, in a suit depending in said supreme court, wherein Salomon & Simpson, assignees of J. O. Nixon, ex rela. State of Louisiana, are plaintiffs and appellants, and James Graham, auditor, The State of Louisiana intervenor, defendants & appellees, judgment was rendered against the said appellants; and the said Salomon & Simpson, assignees, &c., having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Graham, auditor, H. C. Warmoth, governor, & Simeon Belden, att'y gen'l, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said Salomon & Simpson shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

SALOMON & SIMPSON. [L. S.]
CHA'S T. HOWARD. [L. S.]
[L. S.]

Sealed and delivered in the presence of—
D. C. LABATT.

(Indorsed:) United States Sup. Court. No. . Salomon & Simpson, assignees, vs. Ja's Graham, auditor, The State of Louisiana, intervenor. Bond for writ of error. Supreme court of La. Filed June 14th, 1871. T. McC. Hyman, d'y clerk. Approved, J. P. Bradley, associate justice Sup. C't U. S.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Louisiana, holding sessions, in New Orleans, greeting:

Because, in the record and proceedings, as also in the rendition of the

Louisiana, do hereby certify that the foregoing one hundred and nine (109) pages, contain a true copy of the transcript of all the proceedings had in the eighth district court for the parish of Orleans, in a certain suit, wherein the State of Louisiana, ex rel. Solomon and Simpson, were plaintiffs, and James Graham, state auditor State of Louisiana, was defendant, and also of the proceedings had in this supreme court on the appeal taken by said plaintiffs, which appeal is now on the files thereof, under No. 3358.

In testimony whereof I have hereunto set my hand and affixed
111 the seal of said court, at the city of New Orleans, this fifteenth day of July, A. D. 1871, and in the ninety-sixth year of the independence of the United States of America.

[SEAL.] T. McC. HYMAN,
Deputy Clerk.

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vs.
JAMES GRAHAM, AUDITOR, STATE OF LOUISIANA, intervenor.
} From the supreme court of Louisiana.

To the honorable the judges of the Supreme Court of the United States at Washington:

The petition of Solomon & Simpson, residents and citizens of Louisiana, respectfully shows—

That in the suit above, styled No. 448, of the eighth district court of the parish of Orleans, and No. 3358 of the supreme court of the State of Louisiana, a final decree was rendered by said supreme court of Louisiana against your petitioners, whereby they are deprived of their right to receive from the state auditor a warrant for $50,331.46; that they are, by said judgment, irreparably injured & aggrieved, and that they are advised and believe that there is manifest error of law and wrong therein to their prejudice and rights; and that said judgment is in violation of section No. ten, article first, of the Constitution of the United States; that they are desirous of having said judgment revised, reviewed, and corrected, by the Supreme Court of the United States by writ of error, upon their complying with the requisites, conditions, and stipulations of law in such cases, made and provided, & giving bond as the court may order & to its satisfaction.

Wherefore petitioners pray the court to grant them a writ of error, returnable to the Supreme Court of the United States, at its next term in Washington, D. C., on their giving bond according to law, and as the court may direct, conditioned as the law directs; and that
113 the due and proper notices, citations, & services, be made thereof on the defendant and the intervenor, or their counsel of record, according to law, and for all general & equitable relief.

LABATT & ARONI,
Att'ys for Petitioners.

Order.

A writ of error is allowed in this case as prayed for, and according to law, returnable to the Supreme Court of the United States on the first Monday of December next, at Washington, D. C., the petitioner giving

bond in the sum of one thousand dollars, with good & solvent surety, conditioned as the law directs.

New Orleans, June 13th, 1871.

JOS. P. BRADLEY,
Associate Justice Sup. C't U. S.

(Indorsed:) Solomon & Simpson, assignees of J. O. Nixon, vs. James Graham, auditor, State of Louisiana, intervenor. Petition of appeal to Supreme Court of United States & order. Labatt & Aroni, for pl't'ffs. Sup. court of La. Filed June 14th, 1871. M. P. Julian, dep'y cl'k.

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Whereas, lately, at a supreme court of Louisiana holding sessions in New Orleans, in a suit depending in said supreme court, wherein Salomon & Simpson, assignees of J. O. Nixon, ex rela. State of Louisiana, are plaintiffs and appellants, and James Graham, auditor, The State of Louisiana intervenor, defendants & appellees, judgment was rendered against the said appellants; and the said Salomon & Simpson, assignees, &c., having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Graham, auditor, H. C. Warmoth, governor, & Simeon Belden, att'y gen'l, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said Salomon & Simpson shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

SALOMON & SIMPSON. [L. S.]
CHA'S T. HOWARD. [L. S.]
[L. S.]

Sealed and delivered in the presence of—
D. C. LABATT.

(Indorsed:) United States Sup. Court. No. . Salomon & Simpson, assignees, vs. Ja's Graham, auditor, The State of Louisiana, intervenor. Bond for writ of error. Supreme court of La. Filed June 14th, 1871. T. McC. Hyman, d'y clerk. Approved, J. P. Bradley, associate justice Sup. C't U. S.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Louisiana, holding sessions, in New Orleans, greeting:

Because, in the record and proceedings, as also in the rendition of the

judgment of a plea which is in the said supreme court before you or one of you, being the highest court of law or equity of Louisiana, in which a decision could be had in the said suit between Salomon & Simpson, assignees of J. O. Nixon, ex rela. State of Louisiana, plaintiffs & appellants, and James Graham, auditor, The State of Louisiana intervenor, defendants & appellees, wherein was drawn in question the validity of section 10, article first, of the Constitution of the United States in relation to any law impairing the obligation of a contract, and the decision was against its validity, a manifest error hath happened, to the great damage of the said Ezekiel Salomon & Myer M. Simpson, assignees of James O. Nixon, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] D. URBAN,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United states Sup. Court. No. . Salomon & Simpson, assignees of J. O. Nixon, pl'ffs in error, versus James Graham, auditor The State of Louisiana, intervenor, def'ts in error. Writ of error. Supreme court of La. Filed June 14th, 1871. T. McC. Hyman deputy clerk.

116 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to H. C. Warmoth, governor of the State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Louisiana, wherein Salomon & Simpson, assignees of J. O. Nixon, ex rela. State of Louisiana, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

JOSEPH P. BRADLEY,
Asso. Just. Sup. Ct U. S.

117 (Indorsed:) United States circuit court. No. . Salomon &

Simpson, assignees of J. O. Nixon, pl'ffs in error, vs. Ja's Graham, auditor, The State of Louisiana intervenor, def'ts in error. Citation to H. C. Warmoth, governor.

Marshal's return.

Received Jun' 13, 1871, by the U. S. marshal, and, on the 23rd day of June, 1871, served a copy hereof on H. C. Warmoth, governor, by handing the same to him in person at his domicil on Camp street between Philip & First streets, in this city.

S. W. REED,
D'y U. S. Marshal.

JUNE 23,'71.

On this 23d day of June, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation as stated in his official return hereon.

S. W. REED.

Sworn & subscribed before me.

F. B. VINOT, *D'y Clk.*

Supreme court of La. Filed July 12th, 1871.
T. McC. HYMAN, *D'y Clerk.*

118 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to James Graham, auditor public accounts for the State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Louisiana, wherein Salomon & Simpson, assignees of J. O. Nixon, ex rela. State of Louisiana, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

JOS. P. BRADLEY,
Asso. Justice Sup. C't U. S.

119 (Indorsed:) United States circuit court. No. . Salomon & Simpson, assignees of J. O. Nixon, pl'ffs in error, vs. Ja's Graham, auditor, the State of Louisiana intervenor, defendants in error. Citation to James Graham, auditor.

Marshal's return.

Received Jun' 13, 1871, by the U. S. marshal, and, on the 14th of June, 1871, served a copy hereof on James Graham, auditor, by handing the same to him in person in this city.

S. W. REED,
D'y U. S. Marshal.

JUNE 14, 1871

On this 23d day of June, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation as stated in his official return hereon.

S. W. REED.

Sworn to & subscribed before me.

F. B. VINOT, *D'y Clk.*

Supreme court of La. Filed July 12th, 1871.

T. McC. HYMAN,
Deputy Clerk.

120 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to The State of Louisiana, through Simeon Belden, attorney general of said State, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Louisiana, wherein Salomon & Simpson, assignees of J. O. Nixon, ex rela. State of Louisiana, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice shonld not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

121 (Indorsed:) United States circuit court. No. . Salomon & Simpson, assignees of J. O. Nixon, pl'ffs in error, vs. Ja's Graham, auditor, The State of Louisiana intervenor, def'ts in error. Citation to Simon Belden, att'y gen'l.

Marshal's return.

Received Jun' 13, 1871, by the U. S. marshal, and, on the 14th of June, 1871, served a copy of this citation in error on Simeon Belden, attorney general, by handing the same to him in person in this city, at his office, 26 St. Charles street.

S. W. REED,
D'y U. S. Marshal.

JUNE 14, 1871.

On this 23 day of June, 1871, personally appeared before me the subscriber, S. W. Reed, and makes oath that he delivered a copy of the within citation as stated in his official return hereon.

S. W. REED.

Sworn & subscribed before me.

F. B. VINOT, *D'y Clk.*

Supreme court of La. Filed July 12th, 1871.

T. McC. HYMAN, *D'y Clerk.*

(Indorsement on cover:) No. 373. Ezekiel Salomon and Myer M. Simpson, assignees of James O. Nixon, plaintiffs in error, vs. James Graham, auditor, & The State of Louisiana intervenor. Louisiana sup. court. Filed 4th November, 1871.

IN THE

Supreme Court of the United States.

December Term, 1871.

EZEKIEL SOLOMON AND MEYER M. SIMPSON, PLAINTIFFS IN ERROR,
vs.
JAMES GRAHAM, AUDITOR, AND THE STATE OF LOUISIANA.

No. 373.

Please to take notice that on Friday, the 1st day of November next, 1872, I will move the court to dismiss the writ of error in this case, on grounds set forth in the brief which I hand you herewith.

Respectfully,

THOMAS J. DURANT,
Of Counsel for Defendants in Error.

I have received a copy of the above this 27th day of September, 1872.

JOHN J. KEY,
Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1871.

EZEKIEL SOLOMON AND MEYER M. SIMPSON, PLAINTIFFS IN ERROR, *vs.* JAMES GRAHAM, AUDITOR, AND THE STATE OF LOUISIANA. } *No.* 373.

In Error to the Supreme Court of Louisiana.

Motion to dismiss Writ of Error.

BRIEF OF COUNSEL OF DEFENDANTS IN ERROR ON MOTION TO DISMISS.

The counsel undersigned, appearing for the State of Louisiana, and for James Graham, auditor of public accounts of said State, has filed a motion to dismiss the writ of error, and has served a copy of such motion and of this brief on the counsel of plaintiffs in error, under the amendment to the sixth rule, on the 27th day of September, 1872; and in support of the motion he respectfully submits the following statement from the record, together with his points and authorities.

STATEMENT.

1. On the 28th February and 1st March, 1871, the legislature of Louisiana passed over the Governor's veto "An act for the relief of James O. Nixon, late public printer," appropriating to him $50,331.46, and the auditor of public accounts was required to issue his warrant on the treasurer for the amount in Nixon's favor.

See Rec., pp. 2 and 3.

Acts of Louisiana of 1871, No. 32, p. 81.

2. J. O. Nixon transferred all his title and interest in the appropriation to the plaintiffs in error.

See Rec., pp. 3, 4, and 5.

3. The transferrees of the claim, the plaintiffs in error here, appeared before the eighth district court of the parish of Orleans, alleging that they had called upon James Graham, auditor of public accounts for the State of Louisiana, to make a warrant in their favor on the State treasury for the amount of the appropriation, which he had refused to do. Thereupon they prayed for a writ of mandamus from the court, to be directed to said Graham in his official capacity, ordering him to make out a warrant as requested.

See Rec., pp. 1 and 2.

4. The eighth district court of New Orleans granted an order *nisi*.

See Rec., p. 2.

5. The auditor, James Graham, appeared, and showed for cause that the constitution of Louisiana forbade him to perform the act required of him, for whereas the said constitution prohibited the increase of the debt of the State beyond twenty-five millions of dollars; the debt already exceeded that amount before the passage of the act in favor of Nixon; consequently said act was unconstitutional, null, and void, and he, as auditor, could not be required to execute it.

See Rec., pp. 5, 6, and 7.

6. The attorney-general of Louisiana, on behalf of the State, intervened in the cause, and opposed the issuing of the mandamus likewise, on the ground that the act was a violation of the State constitution.

See Rec., pp. 7 and 8.

7. After hearing evidence and argument of counsel, the judge of the eighth district court of New Orleans gave judgment, refusing the mandamus prayed for.

See Rec., p. 33.

8. From this judgment the relators appealed to the supreme court of Louisiana.

See Rec., pp. 33 and 34.

9. The case was argued before the supreme court of Louisiana, and there the judgment appealed from was affirmed.

See Rec., p. 40, foot.

The report of the case in 23d Louisiana Annual, p. 402.

10. From this judgment of the supreme court of Louisiana the relators have sued out a writ of error to this court.

See Rec., pp. 42 and 43.

POINTS.

1. There is no federal question involved in this case, and nothing to give the court jurisdiction under the 25th section of the act of 24th September, 1789. (1 Statutes at Large, p. 85; and act of February 5, 1867, 14 Statutes at Large, pp. 386–7.)

2. The only question involved in the cause was the validity of an act of the Louisiana legislature in reference to the constitution of the State, and the decision of the highest court was against its validity; but no question appears to have been raised on the record that the Constitution of the United States, or a law or treaty thereof, was drawn in question.

Crowell *vs.* Randall, 10 Peters, 368.

3. If this court can regard other grounds of reversal than such as appear on the face of the record, as seems to be implied *dubitando* in the case of Stewart *vs.* Kahn, (11 Wallace, p. 503, top,) then it is submitted in this case it will be impossible to conjecture any.

There cannot be suggested by the plaintiffs in error any repugnance between the act of the Louisiana legislature and the United States Constitution, treaties, or laws.

The clause of the constitution of Louisiana limiting the State debt is certainly not obnoxious to any such charge; and the interpretation of the State constitution by the State courts is not a matter for review in the federal tribunals.

See State *vs.* Insurance Company, 11 Wallace, p. 204.

Respectfully submitted.

THOMAS J. DURANT,
Of Counsel for Defendants in Error.

I have received a copy of the above brief and of the notice of motion to dismiss writ of error, this 27th day of September, 1872.

JNO. J. KEY,
Of Counsel for Plaintiffs in Error.

SUPREME COURT UNITED STATES

No. 373—December Term, 1871.

EZEKIEL SALOMON & MEYER M. SIMPSON,
PLAINTIFFS IN ERROR,
VERSUS
JAMES GRAHAM, STATE AUDITOR, STATE OF LOUISIANA, IN ERROR TO THE SUPREME COURT OF LOUISIANA.

Answer and Authorities Upon the Motion to Dismiss; Brief of Counsel for Plaintiffs in Error.

The counsel for plaintiffs in error respectfully submit the following argument and authorities to sustain the jurisdiction of this Honorable Court:

The nature of the suit necessarily precluded plaintiffs from setting up directly the constitutionality of the act of the Legislature, but in claiming under that act the performance of a mere ministerial duty, they certainly affirmed its validity and constitutionality under the laws of Louisiana and the supreme law of the land, viz: the Constitution of the United States. The unconstitutionality of the act was, however, ex-

SUPREME COURT UNITED STATES

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The nature of the suit necessarily precluded plaintiffs from setting up directly the constitutionality of the act of the Legislature, but in claiming under that act the performance of a mere ministerial duty, they certainly affirmed its validity and constitutionality under the laws of Louisiana and the supreme law of the land, viz: the Constitution of the United States. The unconstitutionality of the act was, however, ex-

pressly drawn in question by the defendants in error, and especially by the intervention of the State of Louisiana, the provisions of whose act plaintiff was seeking to have obeyed by the Auditor. See Transcript, p. 7, p. 6.

It is apparent upon the Record, that the decision of the Supreme Court of Louisiana is entirely based upon the alleged unconstitutionality of the Act No. 32, of the General Assembly, See Trans., p. 36, as being violative of the prohibition in the amendment to article — of the Constitution of Louisiana, to wit: "That prior to the 1st January, 1890, the debt of the State shall not be so increased as to exceed twenty-five millions of dollars." (This was promulged 15th Dec., 1870.)

Here then is a party claiming under an act of the Legislature, declared by the Supreme Court to be violative of an article in the Constitution of the State, which article it is retorted, is violative of the Constitution of the United States, *quoad* this particular act, and the Constitution of the United States has been *misconstrued, or the decision could not have been made.* Upon the face of the Record, it thus appears that the decision has manifestly disregarded the supreme law of the land embodied in Art. 1, sec. 10, of the Federal Constitution, which limited the people of the State in the power to adopt a provision in their constitution the interpretation of which "*impairs the obligation of a contract.*"

That there was a contract between the State a

Nixon prior to the adoption of the amendment, we refer the Court to the words of the Act No. 32: "*Whereas, the State of Louisiana, by act of March 22d, 1866, and by her contract with James O. Nixon, as Public Printer.*" See Trans., p. 2.

The case of Crowwell vs. Randell, cited by defendants in error, instead of supporting the motion to dismiss, seems on the contrary to establish clearly, the jurisdiction of this Court. This Honorable Court will not fail to perceive, and properly estimate, that the peculiar nature of this action precluded plaintiff in error from more expressly setting up the unconstitutionality of the decision until it became final, and it was this finality in adhering to a misconstruction of the supreme law of the land which gave jurisdiction to this Honorable Court. Until then, there was hope, that they would retrace their steps. Therefore, in the application for the writ of error, p. 42 of the manuscript, it distinctly appears that it is "the judgment of the Supreme Court of Louisiana against your petitioners, by which they are irreparably aggrieved, etc., and *that said judgment is in violation of section No. 10, article first, of the Constitution of the United States.*"

It is demonstrable by the Record, that the question of the constitutionality of a law of the State did arise and was decided. It is fair to presume that every argument to maintain its constitutionality was used, and if the validity of the act No. 32, was by the 10th sec. of Art. 1 of the Federal Constitution, saved and ex-

cepted from the application of the amendment of 1870 to the Constitution of Louisiana, then the act was valid, and the decision was made, in the Court below, in violation of the Constitution of the United States, and is clearly within the words, spirit and meaning of the 25th section of the act of 1789, "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of being repugnant to the constitution, and the decision is in favor of such their validity," or "where is drawn in question the construction of any clause of the constitution." Who can deny that the Record and the decision maintain a construction of a constitutional provision, which is repugnant to an article of the Federal Constitution forbidding such an interpretation?

This Honorable Court says in 10 Peters, 391, "That the principal, perhaps the only important difficulty, which has ever been felt by the Court, has been in ascertaining in particular cases whether these matters (the question and decision) were apparent on the Record. And here the doctrine of the Court has been, that it is not indispensable that it should appear on the Record *in totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the Court below on the very point, but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made and that the Court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

The case in 6 Cranch, p. 286, seems directly in point, and is relied upon. In that case it was contended that the Court had no jurisdiction, because the cause turned exclusively on the Confiscation laws of Maryland, and that no question relative to the construction of the treaty of peace did or could occur. But, upon the facts stated on the Record, the only title asserted by the original plaintiffs was founded on the Confiscation Acts of Maryland; and the only title set up by the original defendant was for a British alien, protected by the treaty of peace. If that title was so protected, then the plaintiffs were not entitled, to the relief sought by the Bill; if otherwise, then the plaintiffs were entitled to a decree. The State Court decided that the plaintiffs were so entitled; and therefore necessarily decided against the treaty as a protection. The jurisdiction was maintained by this Court upon this posture of the facts; and the decision of the State Court was afterwards affirmed. But the Court said, that in order to decide upon the main question, it was indispensable to ascertain what the nature of the title was, to which the treaty was sought to be applied.

In the case in 1 Wheat. 304, 355, the Court said: "It is apparent, from this summary explanation, that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant in error (against which the State Court had decided) was perfect and complete if it were protected by the treaty of 1783. If therefore, this Court had authority to

examine into the whole Record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview of the 25th section of the Act; for there was nothing in the Record upon which the Court below could have decided but upon the title, as connected with the treaty. And if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances, it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendants. It would then fall within the very terms of the Act."

In 4 Wh. 311, 315, Mr. Ch. J. Marshall said: "It would not be required that the Record should, in terms, state a misconstruction of an Act of Congress, or that an Act of Congress was drawn in question. It would have been sufficient, to give the Court jurisdiction of the cause, that the Record should show that an Act of Congress was applicable to the case."

Commenting on the facts of this case in 10th Peters, your Honors said: "The jurisdiction would have attached if the fact of insolvency had appeared, because, upon the statements of facts, the State Court must, under these circumstances, have *misconstrued* the Act of Congress or *disregarded it*, for otherwise, they would not have given the judgment which was sought to be revised." Applying this decision to the case at bar,

it is undeniable, that if the Supreme Court of Louisiana had not disregarded and misapplied the true interpretation of section 10, Art. 1st of the Constitution of the United States, they never could have decided Act 32 to be unconstitutional, in which a contract existing in 1866, was subsequently annulled in 1870. There can be no doubt that the prohibition against impairing the obligation of a contract is as binding upon a State as upon individuals.

In 1st Peters, 98, Judge Marshall again decided that "In the construction of that section (the 25th), the Court has never required that the treaty or Act of Congress, under which the party claims, who brings the final judgment of a State Court, into review before this Court, should have pleaded specially or spread on the Record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the Record should show a complete title under the treaty or Act of Congress, and that the judgment of the Court is in violation of that treaty."

In the case at bar, plaintiffs in error assert that by virtue of the Act No. 32, under the mantle and protection of section 10 of Art. 1st of the Federal Constitution, they had the complete title to the relief sought from the Auditor and the State of Louisiana, and the judgment of the Court violated the article of the Federal Constitution by misconstruction or a total disregard thereof, and from that moment this Honorable Court was vested with jurisdiction.

In the case of 2 Peters, 245, 250, the Ch. Justice said: "We think it impossible to doubt that the constitutionality of the Act (of Delaware) was the question and the only question, which could have been discussed in the State Court. That question must have been discussed and decided. This Court has repeatedly held in favor of jurisdiction in such a case. 1st Wh. 304, 4 Wh. 311, 12 Wh. 117, are expressly in point. They establish, as far as precedent can establish anything, that it is not necessary to state in terms on the Record, that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act, if the Record shows, *that the Constitution, or a law, or a treaty of the United States, must have been misconstrued, or the decision could not have been made,* or, as in this case, that the constitutionality of a State law was questioned and the decision was in favor of the party claiming under such law."

This jurisprudence was reiterated by Justice Washington in 2 Pet. 380. "In that case it was manifest that the constitutionality of the Act was drawn in question. It was equally manifest, that the right of plaintiff to recover in that action depended on that statute."

In 3 Peters, 292--302, this Honorable Court again decided that "it had been often decided in this Court, that it is not necessary, that it should appear, in terms, upon the record, that any such question was made. It is sufficient, if from the facts stated, *such a question must* have arisen, and the judgment of the

State Court would not have been what it is, if there had not been a misconstruction of some act of Congress, or a decision against the validity of the right, title, privilege or exemption set up under it."

In 4th Peters, 410, Ch. J. Marshall, affirming the jurisdiction of the Court, distinctly states, that the construction of the Supreme Court has uniformly been, "that it is not necessary to state in terms, in the record, that the Constitution, or treaty, or law, of the United States has been drawn in question, or the validity of a State law, on the ground of its repugnance to the Constitution. It is sufficient if the record shows that the Constitution, or a treaty, or law, of the United States *might have been construed*, or that the constitutionality of a State law must have been questioned; and the decision has been in favor of the party claiming under such law."

In Davis vs. Packard, 6 Pet., 41—48, Mr. Justice Thompson, said: "It has also been settled that, in order to give jurisdiction to this Court under the 25th section of the Judiciary Act, it is not necessary that the record should state in terms, that an act of Congress was in point of fact drawn in question. It is sufficient if it appear from the record, that an act of Congress was applicable to the case, and was misconstrued, or the decision in the State Court was against the privilege or exemption specially set up under such statute." In 9 Peters, 234, it was again clearly laid down that "we can inquire only whether the record

shows that the Constitution of the United States has been violated by the decision of the State Court." Upon the principle announced in this case, it is incumbent upon this Honorable Court to examine whether the Act No. 32 is constitutional or not. There is no question of its constitutionality but for the existence of the amendment of 1870 to the State Constitution. The validity of this amendment, or the construction placed upon it, depends upon the proper construction of an article of the Federal Constitution, and the proper construction of the latter as applicable to the facts in the record, are necessarily drawn in question, and have been disregarded or misconstrued by a final decree of the State Court. How can there be a doubt as to the jurisdiction of this Honorable Court in such a case, fortified as the sacred right of appeal is, by the spirit, meaning, words of the statute and an unbroken current of uniform precedents ?

This Honorable Court, in 1st Wallace, 143, Bridge Prop. vs. Hoboken Co., again reviews the jurisprudence fully, and said : "It would be a new rule of pleading and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States on which he relies for the action of the court in the protection of his rights. *If the courts of this country, and especially this Court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the U. S.* And if the plaintiff and defendant, in their pleadings,

make a case which necessarily comes within some of the provisions of that instrument, this Court surely can recognize the fact without requiring the pleader to say in words, 'This paragraph of the Constitution is the one involved in this case.'"

In 16 Peters, 281, Judge Catron laid down the true rule, when he said: "The first mode is either by express averment or by necessary intendment in the pleadings." The sixth is, "That it must appear from the record that the question was necessarily involved *in the decision*, and that the State Court could not have given the judgment or decree which they passed without deciding it." Your Honors have also said in 6th Wallace, 143, "that the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." The statement of facts, or the legal attitude of the parties in that case, were singularly identical with the case at bar.

The defendants claimed under the act of 1860 of the N. J. Legislature, a right to build their railroad bridge over the Hackensack River inside the limits prohibited by the act of 1790. The plaintiff's say, that to permit this is to violate the contract which they have with New Jersey, and therefore the act of 1860, so far as it confers said authority on defendants, is made void by the Constitution of the U. S., because it impairs the

obligation of a contract. The State Court dismissed the bill on these pleadings alone. It could not have done this without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure whatever over the Hackensack River. In holding that act to be valid, notwithstanding plaintiffs' claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th sec. of the act of 1789." And again the Court adds: "It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the *construction* placed upon that act by the State Court. If this construction is one which violates the plaintiff's contract and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this Court, and that the Court will not be discharging its duty to see that no State Legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases." Your Honors concluded that it was then the act of 1790, like the act No. 32, recognizing Nixon's contract of 1866, which required construction, and not that of 1860, (the amendment to the Constitution in 1870), in order to determine whether the latter was valid or not."

"It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of

a State, whenever such a Court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant to be one, within the meaning of that clause of the Constitution of the United States, which inhibits the States from passing any laws impairing the obligation of contracts."

"Of what use," this Court says, in 1st Black, 436, "would the appellate power of this Court be to the litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide independently of all adjudication by the Supreme Court of a State, whether or not the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the Supreme Court of a State in such matters, when it entertains a different opinion." To apply the facts of the case in 1st Wallace 145, to the case at bar, your Honors will find that Nixon claimed under a contract made with the State of Louisiana in 1866, that $50,000 was due him. The State acknowledges the fact and passes a law in 1871 to pay him. He is opposed by the law officers of the State, by the plea of unconstitutionality arising out of an amendment to the Constitution passed in 1870 limiting the State debt to 25 millions. What was on trial and what was decided by the Court in final resort? Why, simply that the amendment to the Constitution should be so construed as to impair the obligation of a contract made several years previously. Properly con-

strued under the Constitution of the United States, Nixon's debt was one of those recognized and preserved rather than destroyed by the amendment, and unaffected by it. It was then the contract with Nixon in 1866, for which payment was provided in 1871, that required and received construction, and not the amendment of 1870, in order to determine its validity. It is humbly submitted this view of plaintiff's rights amounts almost to a mathematical demonstration.

It was impossible for plaintiffs in error, more clearly than they have done, to have set forth by anticipation, the protection of a fundamental principle of Constitutional jurisprudence forbibbing the impairing of contracts, or to anticipate a misconstruction by the Supreme Court of Louisiana of a provision that in reality consecrated and preserved the *then* debt of the State at twenty-five millions, *except in argument.* It is indubitable that when the State of Louisiana, by act 32, though passed in 1871, acknowledges the existence of Nixon's debt *in* 1866, under a contract, it became one of the very debts intended to be and was really protected by the amendment of 1870, as part of the twenty-five millions which the State could not afterwards increase. This debt was then sheltered by the Constitution of the United States forbidding any construction that "impaired the obligation of a contract." Indeed the construction placed upon the amendment not only impaired but actually destroyed the contract, and prevented its payment. No stronger

case could be presented within the jurisdiction of this Court under the laws, decisions and Constitution of the United States, by which a citizen is more completely denuded of his rights and privileges under the Constitution. We repeat, that the jurisdiction of this Court is sustained on the face of the Record by the third class of cases referred to in section 25th of the judiciary act, "where is drawn in question the construction of any clause of the Constitution of the United States, and the decision is against the title, right, privilege and exemption claimed by either party, under such clause of said Constitution, and that this fact appears by the decision and could not have appeared before it became final. In other words it was the decision alone which violated the Constitution of the United States, and brought it within the purview if not the very words of the statute, and the uniform decisions of this Honorable Court.

Counsel for defendants in error say: "There cannot be suggested by plaintiffs in error any repugnance between the Act of the Legislature and the United States Constitution, treaties or laws." Of course he does not, because he is seeking to enforce that act, under the protection of the Constitution of the U. S., and the decision has been against its validity, *ergo* this Court has jurisdiction to revise the judgment. He assumes the whole question when he says "The clause of the Constitution of Louisiana limiting the State debt is certainly not obnoxious to any such charge." When this

Honorable Court expresses this opinion plaintiff will be satisfied, but not until then. It is the sole object he has in view to submit that point for its consideration and for which he prosecutes this writ of error. We cannot agree with counsel for defendants in error, "that the interpretation of the State Constitution by the State Courts, is not a matter for review in the Federal tribunals," and the authority quoted fails to sustain any such proposition. It is elementary that State laws and State constitutions are alike subordinate to the superior authority of the Federal compact, and this Honorable Court happily would never shrink from the responsibility of obliterating an article in the Constitution of a State, whose terms or interpretation was repugnant to the paramount law of the land, any more than it would hesitate about overthrowing an Act of the Legislature that was null and void, which it has frequently done.

In the case of Jeff. Branch Bank vs. Skelly, 1st Black 437, the principles enunciated by the Court are based on facts quite analogous to those presented by this Record. The Supreme Court did not hesitate to set aside a Constitational provision which indirectly attacked a previous contract between a State and a Bank, and said the rule of non-interference did not apply to such a case. That "Fidelity to the Constitution of the United States makes it necessary, that in such a matter this Court should not follow the construction of a State Court, with whose opinion it cannot concur, and it makes no difference in the obligation whether

the contract is in the shape of a law, or of a covenant by the State, by the State agents." And your Honors furthermore decided the point directly involved in our case, "that a provision of the State Constitution adopted after the Charter of the State Bank, that a higher tax might be imposed on all banks than that stipulated in the Charter of the State Bank, cannot be applied to the State Bank and its Branches, without a violation of the contract." In that case it is noticeable that no special plea of unconstitutionality was plead, and that it was only in the *decision* of the lower Court, that it appeared they had failed to apply the article of the Constitution, precisely the fact developed by our Record, to give this Court jurisdiction.

In 11th Wallace, p. 209, cited by counsel, Justice Bradley said: "Had the State Courts decided against the *right* of the plaintiffs, and had it so appeared by the Record, the jurisdiction of this Court would have attached to the cause," and he distinctly says: "We have repeatedly held that the construction of State statutes (not constitutions) belongs to the State Courts and is not a Federal question which we can revise in a writ of error. It is true, if the State Court gives such a construction to a State statute (and we suppose a State Constitution also) as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a federal question is raised

and we can review the decision on the point of the validity of the statute." This is precisely the case at bar, with this explanation, that instead of the statute we invoke being on trial as to its validity, it is really the amendment to the Constitution of the State, which is pleaded against it which is on trial, and the validity of the one depends exclusively upon the proper interpretation of a clause in the Federal Constitution, over which this Court has undoubtedly jurisdiction.

The grand principle consecrated by this Honorable Court in 1st Wal. 142 seems to be, that whenever any American citizen enters the Courts of his country, he tacitly claims the enforcement of its paramount constitutional authority and invokes the ægis of its transcendant protection, in whatever mode and manner, no matter how insidious it is assailed by any subordinate authority appearing either in the pleadings, the defence, or the decision.

All which is respectfully submitted.

LABATT & ARONI.

of Counsel.

John I Key of Counsel of pltff in error

Note.—Your Honors will find in the Petition, p. 1, that plaintiffs in error invoked "the laws" to require the Auditor to issue the warrant under the Act, and on page 21 that they claimed "*That the prohibition of the Constitution did not intend, and does not, invalidate the contract or nullify the law imposing the duty on the Auditor.*" Thus showing on the face of the record, express mention of what is required to maintain the appellate jurisdiction of this Honorable Court.

C P of La 329

Stewart vs Kahn 11 Wallace 503